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A note by Harry Ganderson, law student not a member of the Student Board of Editors, appears in this issue.

NOTES AND COMMENTS

Attorney and Client—Withdrawal of Attorney.

When defendant's attorney's motion for continuance was refused, he asked and was granted permission by the court to withdraw as counsel. Defendant was absent from the courtroom. Trial ensued, resulting in a verdict against the defendant who appealed from the trial court's refusal to set aside the verdict on the grounds of surprise and excusable neglect. *Held,* the trial court erred in granting the attorney leave to withdraw in the absence of a showing that the defendant had adequate notice and a fair opportunity to be heard. However, the motion to set aside was properly denied because evidence indicated that the withdrawal was a collusive attempt by attorney and client to coerce the court into a continuance, and the defendant offered no proof of lack of notice or of a meritorious defense.[1]

[1] Roediger v. Sapos, 217 N. C. 95, 6 S. E. (2d) 801 (1940).

The instant decision affords an occasion to examine the question of an attorney's voluntary withdrawal from litigation prior to its termination. Central interest focuses upon three aspects: (1) what are the prerequisites to withdrawal; (2) under what circumstances is such action by an attorney justified; and (3) what results flow from a premature withdrawal.

Undeviating authority has recognized that an attorney's acceptance of employment involves the assumption of an entire contract obligating him to conduct the particular proceeding to its termination.[2] However, such an obligation should not be too rigidly enforced, for it lacks reciprocity as to the client, who enjoys an arbitrary right of discharge at any time, regardless of motive.[3] In determining the procedure incident to withdrawal it is essential to differentiate between a severance of the attorney-client relationship and a withdrawal as attorney of record. Once an attorney has entered a formal appearance upon the court record, it requires express leave of court to dissolve this status.[4] The mere filing of a statement of withdrawal with the clerk is ineffective.[5] Until formal leave is granted, both the court and the adverse party may continue to look to the attorney despite any *de facto* abandonment of his client.[6] No jurisdiction goes the length of requiring leave of court to terminate a relationship existing solely between client and attorney.[7] Any such insistence would appear unduly cumbersome and restrictive. Ordinarily, consent of client will warrant a withdrawal,[8] although the Code of Ethics of the American Bar Association decrees that consent alone will not justify a withdrawal to the client's detriment unless the attorney's honor and self-respect are at stake.[9] In the absence of consent, an attorney may withdraw for justifiable cause after giving reasonable notice.[10] No rule of thumb exists to measure "reasonable

[2] Pickard v. Pickard, 83 Hun 338, 31 N. Y. Supp. 987 (Sup. Ct. 1894); McLaughlin v. Nettleton, 47 Okla. 407, 148 Pac. 987 (1915); 1 THORNTON, ATTORNEYS AT LAW (1914) §139.

[3] Tenney v. Berger, 93 N. Y. 524 (1883). Accord: *In re* Dunn, 205 N. Y. 398, 98 N. E. 914 (1912); note (1938) 16 N. C. L. REV. 152.

[4] United States v. Curry, 6 How. 106, 12 L. ed. 333 (U. S. 1848); Kreiger v. Kreiger, 221 Ill. 479, 77 N. E. 909 (1906); Symmes v. Major, 21 Ind. 443 (1863); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933); *in re* O'Brien, 93 Vt. 194, 107 Atl. 487 (1919).

[5] Dooley v. Slavit, 53 R. I. 265, 165 Atl. 771 (1933).

[6] United States v. Curry, 6 How. 106, 12 L. ed. 333 (U. S. 1848); Kreiger v. Kreiger, 221 Ill. 479, 77 N. E. 909 (1906); Bostock v. Brown, 198 Wash. 288, 88 P. (2d) 445 (1939).

[7] Powers v. Manning, 154 Mass. 370, 28 N. E. 290 (1891); Bostock v. Brown, 198 Wash. 288, 88 P. (2d) 445 (1939).

[8] Coopwood v. Wallace, 12 Ala. 790 (1848); Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262 (1893).

[9] Rule 44, Canons of Professional Ethics of the American Bar Association.

[10] Powers v. Manning, 154 Mass. 370, 28 N. E. 290 (1891); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933); McLaughlin v. Nettleton, 47 Okla. 407, 148 Pac. 987 (1915).

notice", but a letter stating that the attorney "felt justified in withdrawing" has been held insufficient.[11] Likewise, it is not readily determinable what conduct on the attorney's part will amount to an abandonment. It has been inferred from long continued neglect,[12] from acquiesence in the engagement and work of other counsel,[13] and from a refusal to proceed pursuant to a client's orders.[14] This question has been held to be a matter of law for the court,[15] and, conversely, a matter of fact for submission to the jury.[16]

A court will permit an attorney's withdrawal from pending litigation only for justifiable cause and after a showing of due notice to the client enabling the timely retention of other counsel.[17] Despite the existence of adequate cause, withdrawal is not a matter of right but rather rests within the discretion of the court and is subject to review only for manifest abuse.[18] Thus regardless of the provocation, an attorney will not be permitted to abandon his client at a critical time, leaving him helpless to face an emergency.[19] Again, if the opposing party[20] or the court[21] would be unduly prejudiced by withdrawal, such request will be refused. Should an attorney persist in withdrawal, then, as an officer of the court subject to its disciplinary power, he may be compelled to continue or else expose himself to punishment for contempt.[22]

No sufficiently inclusive criterion has been evolved to determine the existence of justifiable cause.[23] Instead, resort must be had to those particular instances where withdrawal has received judicial sanction. Sufficient justification was found in the following cases: client's abuse and humiliation of attorney;[24] substitution of antagonistic receivers for

[11] *In re* Coffin's Estate, 129 Iowa 862, 179 N. W. 123 (1920).
[12] Miller v. Penniman, 110 Va. 780, 67 S. E. 516 (1910).
[13] Bolte v. Fichtner, 68 Hun 147, 22 N. Y. Supp. 725 (Sup. Ct. 1893).
[14] Farwell v. Colman, 35 Wash. 308, 77 Pac. 379 (1904).
[15] White v. Wright, 16 Mo. App. 551 (1885).
[16] King v. Mann, 207 S. W. 836 (Mo. App. 1919).
[17] Shannon v. Lunsford, 215 Ala. 465, 111 So. 22 (1927); *in re* Coffin's Estate, 129 Iowa 862, 179 N. W. 123 (1920); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).
[18] Linn v. Superior Court in and for Los Angeles County, 79 Cal. App. 721, 250 Pac. 880 (1926).
[19] Spector v. Greenstein, 85 Pa. Super. 177 (1925) (attempt to withdraw on day of trial).
[20] Linn v. Superior Court in and for Los Angeles County, 79 Cal. App. 721, 250 Pac. 880 (1926) (withdrawal would have necessitated a continuance and seriously injured opposing party).
[21] State v. Shay, 3 Ohio N. P. [N. S.] 657 (1906) (attorney's abandonment of criminal case on day of trial obstructed administration of justice and constituted contempt of court).
[22] Roediger v. Sapos, 217 N. C. 95, 6 S. E. (2d) 801 (1940).
[23] See Genrow v. Flynn, 166 Mich. 564, 568, 131 N. W. 1115, 1116 (1911).
[24] Genrow v. Flynn, 166 Mich. 564, 131 N. W. 1115 (1911) (telegram charging attorney with having "deceived, lied, and neglected me in every possible way."); Mutter v. Burgess, 87 Colo. 580, 290 Pac. 269 (1930) (accusation of dishonesty).

original corporate client;[25] client's unethical repudiation of an agreement with the adverse party;[26] client's collusive attempt to prevent attorney's collection of fees;[27] client's refusal to make any agreement as to fees;[28] client's refusal to pay an agreed pre-trial retainer;[29] client's refusal to make advancements to apply on attorney's expenses and fees during a prolonged litigation;[30] client's subsequent restriction of fee to one contingent upon success;[31] worthlessness of client's note given as a retainer;[32] client's secret hiring of other counsel to whom attorney had personal and professional objections;[33] attempt of client's relative to bribe juror;[34] attorney's reasonable belief, as a private prosecutor, of accused's innocence;[35] client's rejection of attorney's plan of procedure;[36] client's refusal to communicate with attorney;[37] and attorney's knowledge that he will be a necessary witness.[38] In other situations an attorney has been held to have not merely justification but also a duty to withdraw: client's case had no fact foundation and required perjured testimony to succeed;[39] attorney's discovery of inconsistency with for-

[25] *In re* Dunn, 205 N. Y. 398, 98 N. E. 914 (1912) (mere change of corporate officials or directors would not warrant withdrawal since this is to be contemplated).

[26] Shannon v. Lunsford, 215 Ala. 465, 111 So. 22 (1927) (agreement made with knowledge and approval of client); Hanly v. McClellan, 156 Mo. App. 454, 137 S. W. 280 (1911) (promise of attorney to opposing counsel for continuance or sufficient time to prepare).

[27] Thomas v. Morrison, 46 S. W. 46 (Tex. Civ. App. 1898).

[28] Chambers v. Gilmore, 193 Fed. 635 (C. C. A. 9th, 1912) (had been no agreement at time of employment); *in re* Coffin's Estate, 129 Iowa 862, 179 N. W. 123 (1920) (attorney engaged only for collection but trial found necessary).

[29] Silver Peak Gold Min. Co. v. Harris, 116 Fed. 439 (C. C. D. Nev. 1902).

[30] Young v. Lanznar, 133 Mo. App. 130, 112 S. W. 17 (1908); Pickard v. Pickard, 83 Hun 338, 31 N. Y. Supp. 987 (Sup. Ct. 1894); Harvey v. Dodge Corp., 169 Misc. 781, 8 N. Y. Supp. (2d) 135 (Surr. Ct. 1938); see Tenney v. Berger, 93 N. Y. 524 (1883). Accord: La Cotts v. Quertermous, 84 Ark. 376, 105 S. W. 872 (1907) (refusal of client to pay more than partial expenses of briefs).

[31] Cullison v. Lindsay, 108 Iowa 124, 78 N. W. 847 (1879) (suit already begun); Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458 (1907) (no prior agreement as to fees when client disclaimed any liability unless attorney secured his discharge from criminal prosecution).

[32] Cooley v. Doherty, 5 La. Ann. 163 (1850).

[33] Tenney v. Berger, 93 N. Y. 524 (1883).

[34] State v. Bersch, 276 Mo. 397, 207 S. W. 809 (1918) (declared that preservation of professional integrity takes precedence over duty to client).

[35] Rush v. Cavenaugh, 2 Pa. 187 (1845) (entitled to believe testimony of dispassionate witness over that of prejudiced client).

[36] Montgomery v. Montgomery, 2 Hawaii 677 (1863) (attorney was one of several retained).

[37] Dempsey v. Dorrance, 151 Mo. App. 429, 132 S. W. 33 (1910) (refusal to speak to attorney); Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060 (1910) (where client refused to confer with attorney, expressed intent to discharge him, and engaged other counsel).

[38] Allen v. Ross, 199 Wis. 162, 225 N. W. 831 (1929).

[39] Gebhardt v. United Rys. Co. of St. Louis, 220 S. W. 677 (Mo. 1920) (client's admission of fraudulent claim to attorney held not a privileged communication); Clark v. Nichols, 127 App. Div. 219, 111 N. Y. Supp. 66 (2d Dep't

mer employment;[40] conflict between the interests of two different clients;[41] attorney's disqualification by virtue of election to judgeship;[42] and attorney's reasonable knowledge that his employment was unnecessary and his compensation unearned.[43] Contrarily, no justification was found where: client failed to appear at trial;[44] client refused to increase contract fee;[45] client refused to pay for services in a prior action;[46] client hired associate counsel to whom there was no reasonable objection;[47] client refused to accept an offer of settlement;[48] attorney was elected mayor of city against which client sought damages;[49] client repudiated promise to pay fee but litigation was at critical stage;[50] legal partnership was dissolved after retainer was accepted;[51] and attorney resigned as public attorney in order to take a conflicting private case.[52] It has been held that the client bears the burden of proving unjustifiable withdrawal both in a suit against an attorney for negligent conduct[53] and also when defending in an action for compensation by an attorney who has withdrawn.[54] In such suits the question of justification for withdrawal is ordinarily one of fact for the jury,[55] but has also been held to be one of law for the court.[56]

Apparently, every jurisdiction holds that a withdrawal predicated on sufficient cause and reasonable notice or upon consent will not work

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1908) (filing by client of affidavit that claim was fictitious); Campbell v. Goodman, 23 Pa. Co. Ct. 609 (1900).

[40] Asher v. Beckner, 19 Ky. L. Rep. 521, 41 S. W. 35 (1897) (attorney engaged to resist collection on land contracts formerly made for another client).

[41] Sweeney v. Kerr's Adm'r, 16 Ky. L. Rep. 33, 25 S. W. 273 (1894).

[42] Baird v. Ratcliff, 10 Tex. 81 (1853).

[43] *In re* Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 351 Ill. 206, 184 N. E. 332 (1932) (profiting by attorneys through political favoritism).

[44] Seasongood v. Prager, 146 App. Div. 833, 131 N. Y. Supp. 771 (1st Dep't 1911) (through mistake); *cf.* Brown v. Green, 132 La. 1090, 62 So. 154 (1913) (implied that repeated failure of client to appear or to submit witnesses would justify withdrawal).

[45] Cassel v. Gregori, 28 Cal. App. (2d) 769, 70 P. (2d) 721 (1937).

[46] Cairo & St. L. R. R. v. Koerner, 3 Ill. App. 248 (1878).

[47] Morgan v. Roberts, 38 Ill. 65 (1865); White v. Wright, 16 Mo. App. 551 (1885) (new counsel engaged to argue a motion).

[48] Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233 (1891).

[49] McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298 (1887).

[50] Spector v. Greenstein, 85 Pa. Super. 177 (1925).

[51] Tomlinson v. Polsley, 31 W. Va. 108, 5 S. E. 457 (1888) (held that obligation was joint and responsibility continues despite dissolution).

[52] Stark County v. Mischel, 42 N. D. 332, 173 N. W. 817 (1919).

[53] Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262 (1893).

[54] Craddock v. O'Brien, 104 Cal. 217, 37 Pac. 896 (1894). *Contra:* Nicholls v. Wilson, 11 Mees. & W. 106, 152 Eng. Reprint 734 (1843).

[55] Young v. Lanznar, 133 Mo. App. 130, 112 S. W. 17 (1908); Pickard v. Pickard, 83 Hun 338, 31 N. Y. Supp. 987 (Sup. Ct. 1894); Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060 (1910).

[56] Cairo & St. L. R. R. v. Koerner, 3 Ill. App. 248 (1878).

a forfeiture of an attorney's right to compensation.[57] Ordinarily, the measure of recovery is based on *quantum meruit*;[58] but a few jurisdictions treat a justified withdrawal as equivalent to a discharge or a prevention of full performance and allow recovery of the full contract price.[59] One jurisdiction will not grant an order of substitution of attorneys until the compensation of the attorney who rightfully withdrew has either been paid or secured.[60] It appears equally well settled that a withdrawal without adequate cause or consent will bar recovery of any compensation by the attorney.[61] Only three decisions contain language to the contrary.[62] Besides denying recovery, North Carolina's Supreme Court has termed it "unprofessional and unconscientious" to seek compensation after an unwarranted withdrawal.[63] Likewise, wrongful abandonment will nullify any lien which has accrued by virtue of the attorney-client relationship,[64] and may expose the attorney to a damage suit for neglect.[65]

As long as an attorney's appearance remains upon the record, service of process or notice upon the attorney will be as effective as if upon the party himself.[66] Exception is made by two decisions which appear to hold that if the adverse party has been given notice of or has consented to a withdrawal, service on the attorney will not be binding.[67] Continuance of the attorney's name upon the record will also serve to validate any acts done by him within the scope of the original authority.[68]

Although a prejudicial withdrawal by an attorney may enable a client to have a verdict set aside on the ground of surprise or excusable neglect,[69] such remedy will be barred where the client had notice and

[57] Cases collected at: 2 THORNTON, ATTORNEYS AT LAW (1914) §453, n. 4, and note (1926) 45 A. L. R. 1141.

[58] *Ibid.*

[59] Mutter v. Burgess, 87 Colo. 580, 290 Pac. 269 (1930); Bonham v. Farmer, 151 S. C. 246, 148 S. E. 878 (1929) (allowed contract price less cost of completing work).

[60] Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060 (1910).

[61] Cases collected at: 2 THORNTON, ATTORNEYS AT LAW (1914) §453, n. 14 and note (1926) 45 A. L. R. 1137.

[62] Jones v. United States, 15 Ct. Cl. 204 (Fed. 1879); Morgan v. Roberts, 38 Ill. 65 (1865); Barnum v. Burlingame, 154 App. Div. 897, 138 N. Y. Supp. 829 (2d Dep't 1912).

[63] See Potts v. Francis, 43 N. C. 300, 304 (1852).

[64] Halbert v. Gibbs, 16 App. Div. 126, 45 N. Y. Supp. 113 (2d Dep't 1897); Eisenberg v. Brand, 144 Misc. 878, 259 N. Y. Supp. 57 (Sup. Ct. 1932).

[65] Howard v. McLarson, 215 Ala. 251, 110 So. 296 (1926).

[66] United States v. Curry, 6 How. 106, 12 L. ed. 333 (U. S. 1848); Ladd v. Teague, 126 N. C. 544, 36 S. E. 45 (1900).

[67] Chicago Pub. Stock Exchange v. McClaughry, 50 Ill. App. 358 (1893); Boyd v. Stone, 5 Wis. 240 (1856).

[68] Hendricks v. Cherryville, 198 N. C. 659, 153 S. E. 112 (1930) (revocation by client); see 1 THORNTON, ATTORNEYS AT LAW (1914) §138, n. 4.

[69] Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933); note (1931) 9 N. C. L. REV. 91.

negligently failed to procure other counsel.[70] Similarly, the negligent failure of a client to engage other counsel after knowledge of his attorney's abandonment should govern the measure of recovery in any later damage suit against the attorney for wrongful neglect.

Even though an attorney be granted leave of court to withdraw, he will not be permitted to withdraw his briefs or the appearance of his client.[71] After withdrawal, any communication between client and attorney which was formerly privileged remains so, but subsequent communications as to the subject matter of the former employment will not be privileged.[72] Any attempt by an attorney to substitute another attorney in his stead without the client's consent or knowledge is a nullity.[73]

North Carolina precedents are in accord with the foregoing principles. Underlying these rules is the struggle to reconcile the high allegiance owed by an attorney to court and client with the practical need to permit a withdrawal from unconscionable and undeserving clients. The attorney's obligation crystallizes into one of *noblesse oblige.*

JAMES K. DORSETT, JR.

Constitutional Law—Taxation—Validity of State Gasoline Tax As Imposed on Interstate Carriers.

An Arkansas statute made unlawful the driving of any automobile or truck into the state with an excess of twenty gallons of gasoline in the tank to be used as motor fuel in that truck or motor vehicle until the Arkansas state tax had been paid thereon. The Arkansas state tax thus referred to was levied, by general statute, at the rate of six and one-half cents per gallon, on gasoline sold or used in the state or purchased for sale or use therein. The state tax authorities were attempting to collect the tax on the entire excess over twenty gallons in the tanks of plaintiff's busses, operating between Tennessee and Missouri via Arkansas, though it affirmatively appeared that part of such excess thus brought into Arkansas would be consumed outside the state. The United States Supreme Court declared the tax unconstitutional as so applied, as such a method of taxation had no fair relationship to the use of the highways for which the charge was made.[1]

[70] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918); Baer v. McCall, 212 N. C. 389, 193 S. E. 406 (1937).

[71] Silver Peak Gold Min. Co. v. Harris, 116 Fed. 439 (C. C. D. Nev. 1902); La Cotts v. Quertermous, 84 Ark. 376, 105 S. W. 872 (1907).

[72] Collection of cases in note (1920) 5 A. L. R. 728.

[73] Jacobson v. Ashkinaze, 337 Ill. 141, 168 N. E. 647 (1929).

[1] McCarroll v. Dixie Greyhound Lines, — U. S. —, 60 Sup. Ct. 504, 84 L. ed. Adv. Ops. 441 (1940). There was a majority opinion by Mr. Justice McReynolds, a concurring opinion by Mr. Justice Stone, and a dissenting opinion joined in by Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas.

The doctrine has become well established that, in the absence of Congressional legislation on the subject, a state may impose a tax on motor vehicles moving in interstate commerce as compensation for the use of its highways.[2] Such state action does not conflict with the inhibitions of the commerce clause of the Federal Constitution, since the state is allowed to charge for the use of the facilities which it provides.[3] However, a state may not impose an occupation tax on interstate commerce, as that would be an unlawful burden.[4] The Court in the principal case admits the existence of the rule that a state may impose a tax on interstate commerce under certain conditions, but does not consider these conditions to be met by the Arkansas statute.

In order to sustain a tax on interstate commerce it must affirmatively appear that the tax is as compensation for the use of the highways or for enforcing regulations of commerce within the state's power.[5] This fact may appear from the express allocation of the proceeds of the tax to highway purposes,[6] the nature of the imposition,[7] the use of the money collected to defray the expenses of regulation and maintenance of the highways,[8] or otherwise.[9] "Otherwise" probably includes state court decisions construing the act.[10] When the constitutionality

[2] Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385 (1915); Continental Baking Co. v. Woodring, 286 U. S. 352, 52 Sup. Ct. 595, 76 L. ed. 1155 (1932); Aero Mayflower Transit Co. v. Georgia Public Service Comm., 295 U. S. 285, 55 Sup. Ct. 709, 79 L. ed. 1439 (1935); Light, *The Supreme Court and Commerce by Motor Vehicle* (1929) 7 N. C. L. REV. 268.

[3] Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916).

[4] Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. 502, 72 L. ed. 833 (1928). In this case it was held that in order to sustain an occupation tax on one engaged in both interstate and intrastate business, it must appear that it is imposed solely on account of the intrastate business, that the amount exacted is not increased because of the amount of interstate business done, that one engaged exclusively in interstate commerce would not be subject to the imposition, and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

[5] Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. 502, 72 L. ed. 833 (1928); Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. ed. 953 (1931); Ingels v. Morf, 300 U. S. 290, 57 Sup. Ct. 439, 81 L. ed. 653 (1937).

[6] Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199 (1927) (where the statute itself said the taxes were to be used for the administration and enforcement of the statute and for the maintenance and repair of the highways); Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. ed. 1245 (1936).

[7] Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 Sup. Ct. 230, 72 L. ed. 551 (1928) (where there was a mileage tax directly proportioned to the use of the highways).

[8] Hicklin v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. ed. 247 (1933) (where the statute provided that the moneys collected for the use of the state highway system should be placed to the credit of the state highway fund, and that collected for use of the roads of counties to be paid to the counties, and that for the use of streets of cities and towns to be paid to the cities and towns).

[9] Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. ed. 953 (1931).

[10] See Sprout v. South Bend, 277 U. S. 163, 170, 48 Sup. Ct. 502, 504, 72 L. ed. 833, 837 (1928).

of the statute is in doubt, the actual use made of the moneys collected may become important.[11] However, if the exaction is lawfully made, it is of no concern to the taxpayer whether the money collected is actually used for the maintenance of the highways.[12] Thus, where the state of Georgia used the returns from a tax on trucks and tractors for the improvement of rural post roads not used by the plaintiff, this feature was declared to be unobjectionable.[13] This point was not discussed in the instant case as it appeared from the statute providing for the amount of the tax that the moneys were to be placed in the State Highway Fund for highway purposes.[14]

The constitutionality of such a tax may also be attacked by showing that it is discriminatory or that the method of computation bears no reasonable relation to the privilege of using the highways.[15] It seems possible also to show that the tax is excessive, although this is probably included in the rule that it must have a reasonable relation to the use of the highways. For example, a California statute charged fifteen dollars for a permit to bring an automobile into the state for the purposes of sale within or without the state. The statute declared that the fee was charged for the purpose of reimbursing the state treasury for the cost of administering the act and policing the traffic caused by the "caravans" at which the statute was aimed. The United States Supreme Court held that the express declaration as to the use of the proceeds of the fee negatived any inference of a purpose to collect the fee as compensation for the use of the highways. Then, on examination into the cost of administering the act, the Court found the fee to be excessive and an unconstitutional burden on interstate commerce.[16]

The fact that intrastate commerce is taxed on a different basis than interstate commerce does not constitute discrimination. In *Interstate Busses Corporation v. Blodgett*[17] the Court said: "Appellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different method or measure of assessment."

The tax in the principal case bore no reasonable relation to the use of the highways. The Court said: "In laying an exaction as a means

[11] See Morf v. Bingaman, 298 U. S. 407, 412, 56 Sup. Ct. 756, 758, 80 L. ed. 1245, 1250 (1936).
[12] Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199 (1927); Johnson Transfer & Freight Lines v. Perry, 47 F. (2d) 900 (N. D. Ga. 1931).
[13] Dixie Ohio Express Co. v. State Revenue Comm. of Georgia, 306 U. S. 72, 59 Sup. Ct. 435, 83 L. ed. 495 (1939).
[14] ARK. DIG. STAT. (Pope, 1937) §11262.
[15] Interstate Transit Inc. v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. ed. 953 (1931).
[16] Ingels v. Morf, 300 U. S. 290, 57 Sup. Ct. 439, 81 L. ed. 653 (1937).
[17] 276 U. S. 245, 251, 48 Sup. Ct. 230, 231, 72 L. ed. 551, 554 (1928).

of collecting compensation for the use of its highways the state must tax commerce as it is done, and not as it might be done if the state could control it."[18] This would seem to indicate that the tax should be confined to the "actual use" made of the highways. However, the United States Supreme Court, in its first decision dealing with this class of cases, upheld a Maryland statute which required a registration certificate, the cost of which varied with the horsepower of the vehicle.[19] The use of horsepower as a standard was said to be a practical measure of size, speed, and control. It was decided that as long as the charges were reasonable and fixed according to some uniform, fair, and practical standard, they constituted no direct burden on interstate commerce. Such a registration fee, based on horsepower, may validly be imposed on a non-resident even though he makes only one trip through the state.[20] This method does not appear to reflect the "actual use" made of the highways.

Where a license fee on carriers is graduated according to the weight of the vehicle, it is usually upheld. Standards may be based on the manufacturer's weighted capacity for trucks and factory weights for trailers,[21] or on the weight and type of vehicle.[22] A fee of one dollar for every hundred pounds of weight of each motor vehicle bears a reasonable relation to the privilege of using the highways of a state.[23] Not only does the actual weight of the motor carrier provide an adequate standard,[24] but the carrying capacity of a motor carrier may also be used to determine the amount of tax for a license or registration fee.[25] These measures reflect the tendency to destruction of the highways rather than the amount of use made by the vehicle. A comparison might be made to the charge in the principal case by virtue of the fact that only large vehicles carry more than twenty gallons, such vehicles having a greater tendency to destruction of the highways by their use than those whose tanks carry less.

However, where a registration fee was based on the manufacturer's

[18] McCarroll v. Dixie Greyhound Lines, — U. S. —, —, 60 Sup. Ct. 504, 507, 84 L. ed. Adv. Ops. 441, 445 (1940).

[19] Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385 (1915).

[20] Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916) (although most states provide for reciprocity of registration, it is not essential to the validity of the statute).

[21] Dixie Ohio Express Co. v. State Revenue Comm. of Georgia, 306 U. S. 72, 59 Sup. Ct. 435, 83 L. ed. 495 (1939).

[22] Britton Motor Service v. Dammann, 14 F. Supp. 634 (W. D. Wis. 1936).

[23] Liberty Highway Co. v. Michigan Public Utilities Comm., 294 Fed. 703 (E. D. Mich. 1923).

[24] Brashear Freight Lines v. Hughes, 26 F. Supp. 908 (S. D. Ill. 1938).

[25] Hicklin v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. ed. 247 (1933); Sanger v. Lukens, 24 F. (2d) 226 (D. Idaho 1927); Aero-Mayflower Transit Co. v. Watson, 5 F. Supp. 1009 (E. D. Ark. 1934); Brashear Freight Lines, Inc. v. Public Service Comm. of Missouri, 23 F. Supp. 865 (W. D. Mo. 1938).

weight of the chassis or the actual chassis weight, whichever was the greater, a federal district court held this method invalid as the tax was computed regardless of the mileage traveled or the load carried.[26] The court found an objectionable feature in that, although the plaintiff made only occasional trips, it had to pay as if it used the highways constantly. This decision seems more consonant with the principal case. Yet, in the majority of cases involving licensing or registration fees, the fact that those who use the highways sporadically must pay the same fee as those who use them continuously has not been regarded as discriminatory or unreasonable.[27] In *Aero Mayflower Transit Company v. Georgia Public Service Commission*[28] the Supreme Court said, with reference to a twenty-five dollar license fee, that one who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may. This seems to point more toward a standard involving "possible use".

Not only the weight but also both the capacity and the size of motor trucks have a direct relation to the wear and hazards of the highways; and since a state may impose reasonable limitation on size and weight, it may tax by that standard.[29] In the instant case it was said that the amount of taxed gasoline had no relation to the size or weight of the vehicles, thus intimating that if such a relation had existed, a basis of constitutionality might be found.

A somewhat different method of taxation is found in the so-called "Caravan Acts", under which a state may require the purchase of a permit for the transportation of cars through a state for the purposes of sale.[30] These fees are to provide for the cost of regulation and the increased depreciation of the roads which the operation of such "caravans" entails. Flat fees are usually charged for each vehicle, with no varying factors. The state is not required to compute with mathematical precision the cost incurred by the state for the regulation of the "caravans" as long as the fees do not appear to be manifestly disproportionate to the services rendered.[31]

[26] Prouty v. Coyne, 55 F. (2d) 289 (D. S. D. 1932); *cf.* Consolidated Freight Lines, Inc. v. Pfost, 7 F. Supp. 629 (D. Idaho 1934).

[27] Aero-Mayflower Transit Co. v. Watson, 5 F. Supp. 1009 (E. D. Ark. 1934); Brashear Freight Lines, Inc. v. Public Service Comm. of Missouri, 23 F. Supp. 865 (W. D. Mo. 1938).

[28] 295 U. S. 285, 55 Sup. Ct. 709, 79 L. ed. 1439 (1935).

[29] Hicklin v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. ed. 247 (1933).

[30] Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. ed. 1245 (1936). A "caravan" usually consists of a large group of cars being transported for the purposes of sale, the cars either being driven singly or in pairs with one car towing another. See Ingels v. Morf, 300 U. S. 290, 292, 57 Sup. Ct. 439, 440, 81 L. ed. 653, 657 (1937).

[31] Clark v. Paul Gray, Inc., 306 U. S. 583, 59 Sup. Ct. 744, 83 L. ed. 1001 (1939).

The imposition of a charge based on ton-mileage is another method which is permissible.[32] One carrier, complaining of the Iowa tax, showed that for every trip made into Iowa, he suffered a loss of approximately four dollars per truck. Nevertheless, the tax, one based on a ton-mile computation, was upheld.[33]

In *Sprout v. South Bend*[34] a tax based on the seating capacity of passenger busses was held to be invalid. The fact that it was a flat fee applying equally to interstate and intrastate commerce, regardless of the number of trips made, militated against the constitutionality of the tax. The Court said that this could hardly be a measure of the cost or value of the use of the highways. This decision seems to be more in harmony with the one under consideration.

Taxes which are directly proportional to the use of the roads embody the most reasonable method of securing compensation. Thus, a tax of one cent a mile on busses engaged in interstate commerce was regarded as having a reasonable relation to the privilege of using the highways;[35] and, also, three fourths of a cent per mile has received approval.[36] However, the greatest objection to the mileage tax is the difficulty of administration. If the Arkansas statute were to be applied only to gas which is to be used in that state, then it would appear to be very closely related to the mileage taxes.

The appellee argued[37] that since the statute in the principal case stated "until the state tax thereon has been paid" without referring specifically to what tax, and it had been construed to refer to the general gasoline tax of six and one half cents a gallon, that the intent of that statute ought to be read into the one under consideration. Therefore, since the tax of six and one-half cents applied to gasoline sold or used in that state or purchased for sale or use therein, this intent of the legislature ought to be applied to the taxing of the gasoline in excess of twenty gallons. Thus, the statute under consideration would be interpreted as applying only to that excess used or purchased for use in Arkansas, which would result in a holding that the statute as to the tax on the excess did not apply to the appellee. It was stated that no

[32] Continental Baking Co. v. Woodring, 286 U. S. 352, 52 Sup. Ct. 595, 76 L. ed. 1155 (1932); Louis v. Boynton, 53 F. (2d) 471 (D. Kan. 1931).

[33] Grolbert v. Board of Railroad Com'rs of Iowa, 60 F. (2d) 321 (S. D. Iowa 1932).

[34] 277 U. S. 163, 48 Sup. Ct. 502, 72 L. ed. 833 (1928); *cf.* Interstate Motor Transit Co. v. Kuykendall, 284 Fed. 882 (W. D. Wash. 1922).

[35] Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 Sup. Ct. 230, 72 L. ed. 551 (1928).

[36] Johnson Transfer & Freight Lines v. Perry, 47 F. (2d) 900 (N. D. Ga. 1931).

[37] Brief for Appellees, p. 29, McCarroll v. Dixie Greyhound Lines, — U. S. —, 60 Sup. Ct. 504, 84 L. ed. Adv. Ops. 441 (1940).

state decisions could be found interpreting the statute in the principal case as applying to excess gasoline to be used in other states and that the Supreme Court was free to consider the interpretation of the statute. However, the Court rejected this argument apparently on the basis that the statute providing for the tax on the amount of gasoline over twenty gallons referred to the other statute only to determine the amount of the tax.

Nevertheless, if the statute should be enforced against an interstate carrier, whose excess was to be used in Arkansas, it would certainly be constitutional and, in the light of previous decisions, would bear a reasonable relation to the use of the highways.

W. O. COOKE.

Deeds of Trust—Active Officers of Banks and Building and Loan Associations Acting as Trustees—Foreclosures.

Plaintiff executed a deed of trust to the corporate defendant to secure indebtedness. Defendant Keesler, the trustee named in the instrument, was secretary and treasurer of the corporate defendant. After a long period of defaults, the trustee instituted foreclosure proceedings, and, after sale, conveyed the premises by deed of foreclosure to the corporate defendant which, in turn, conveyed to an innocent purchaser. At the sale, Keesler entered the bid on the property for the corporate defendant, that bid being in memorandum form, made out in Keesler's own handwriting, but signed by the assistant secretary pursuant to Keesler's order. Plaintiff brings this action against the defendants to recover rents and profits received, or which should have been received, by the defendants from the date of the foreclosure sale to the date of the conveyance to the innocent purchaser, and for damages for the wrongful conversion of his equity in the land. *Held,*[1] judgment as of nonsuit reversed. The trustee acted both for himself, as trustee, and for the creditor, as its chief executive officer. The duties of the offices are inconsistent, and such a trustee cannot occupy the position of disinterested impartiality which is the foundation stone upon which rests the distinction in the law relating to deeds of trust and mortgages. Therefore, this instrument in the form of a deed of trust was, in effect, a mortgage; and mortgage law will be applied.

An intimate relation exists between deeds of trust to secure debts and mortgages, especially mortgages containing powers of sale; in fact, the former are often considered, in legal effect, as being mortgages.[2]

[1] Mills v. Mutual Building & Loan Ass'n, 216 N. C. 664, 6 S. E. (2d) 549 (1940).

[2] Curtin v. Krohn, 4 Cal. App. 131, 87 Pac. 243 (1906); Neikirk v. Boulder Nat. Bank, 53 Colo. 350, 127 Pac. 137 (1912); Fiske v. Mayhew, 90 Neb. 196,

In North Carolina, however, although a creditor may bid at a sale had under the foreclosure of a deed of trust securing a debt for him,[3] a mortgagee may not purchase at his own sale,[4] and if he does the sale is voidable at the election of the mortgagor.[5] When a mortgagee has purchased at his own sale and subsequently reconveyed the property to an innocent purchaser, the mortgagor may elect to disavow the foreclosure and recover damages for the wrongful conversion of his equity of redemption.[6] Such a difference in the rights of a creditor secured by a deed of trust and a creditor secured by a mortgage is based upon the idea that the intervention of an impartial trustee precludes the possibility of the creditor's exercise of oppression in the foreclosure of his security.[7]

Many questions present themselves concerning the application of the principal case. The first consideration is whether this case is applicable only where the trustee is a managing officer of the secured creditor. The court laid some stress on the fact that the trustee here was the chief active executive officer of the building and loan association, but it would seem that if it is impossible for such an officer to be impartial, it would be an even greater impossibility for a lesser employee to be an independent, impartial trustee.

It has long been the practice of many building and loan institutions and banks to name as trustee in deeds of trust the attorney for the institution. While such attorneys are generally not active officers of the banks and building and loan associations, in so far as making loans and calling loans in default are concerned, nevertheless, there is a tangible connection between the two, and it is quite possible that the court might extend the doctrine of the principal case to cover that situation. For that reason, since the decision of the principal case, this practice has been discontinued by some of those institutions, which now designate as trustee an individual who is not connected with the corporations in any capacity. The principal case, therefore, has at least brought about

133 N. W. 195 (1911); Marquam v. Ross, 78 Pac. 698 (Ore. 1904); Marquam v. Ross, 47 Ore. 374, 83 Pac. 852 (1905).

[3] McLawhorn v. Harris, 156 N. C. 107, 72 S. E. 211 (1911); Hayes v. Pace, 162 N. C. 288, 78 S. E. 290 (1913).

[4] Lee v. Pearce, 68 N. C. 76 (1873); Whitehead v. Hellen, 76 N. C. 99 (1877); McLeod v. Bullard, 84 N. C. 516 (1881); Howell v. Pool, 92 N. C. 450 (1885); Shew v. Call, 119 N. C. 450, 26 S. E. 33 (1896); Dunn v. Oettinger Bros., 148 N. C. 276, 61 S. E. 679 (1908); Rich v. Morisey, 149 N. C. 37, 62 S. E. 762 (1908).

[5] Joyner v. Farmer, 78 N. C. 196 (1878); Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766 (1888); Owens v. Branning Mfg. Co., 168 N. C. 397, 84 S. E. 389 (1915).

[6] Warren v. Susman, 168 N. C. 457, 84 S. E. 760 (1915); Davis v. Doggett, 212 N. C. 589, 194 S. E. 288 (1937).

[7] 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §995.

this undesirable result: the tendency after this decision is to appoint trustees who are actually, and not just theoretically, disinterested. From a practical standpoint, it is obvious that one who is in no way connected with the lender will not ordinarily be greatly concerned with his duties as trustee. In many financial institutions, also, an arrangement was formerly made with the person acting as trustee, if attorney or officer of the lending corporation, whereby deeds of trust could be foreclosed at much less than the usual five per cent trustee's commission provided for in the instrument.[8] In the event of a possible re-purchase by the borrower, a foreclosure and sale by an actually disinterested trustee might materially increase the amount of money the lender had invested in the property.

Whether the holding of the principal case means that wherever a deed of trust is executed to a corporation to secure a debt due that corporation, with an officer of the corporation as trustee, the instrument will be construed as a mortgage *per se,* or whether it means that where the above is true, and the trustee holds a sale of the security and the corporation bids it in, then only will the law of mortgages be applied, is unknown. There is support in the opinion for the first alternative, as Justice Barnhill says, ". . . we are led irresistibly to the conclusion that an instrument—in form a deed of trust—executed to the chief active executive officer of a corporation, to secure a debt to the corporation is, in effect, a mortgage, and the law relating to the foreclosure of mortgage deeds rather than the law relating to trust deeds is applicable."[9] This apparently means that where such a state of facts exists in the inception of the relationship between debtor and creditor, the deed of trust executed is then and there a mortgage, and will be treated as such in any litigation concerning the transaction, regardless of the good or bad faith of either party. However, it appears improbable that the court would go that far, should the matter be placed squarely before it for determination. The main object in applying mortgage law to a deed of trust is to prevent any possible fraud, collusion, or injustice, and it is difficult to see how any of these elements

[8] North Carolina has had fair and favorable foreclosure laws, and for that reason the cost of a foreclosure in this state has been very reasonable, whereas, in some of the other states the foreclosure cost is unconscionable, sometimes amounting to several hundred dollars on a relatively small mortgage. Correspondence with several leading North Carolina building and loan associations and banking institutions reveals that in this state where an officer of the corporation acts as trustee he does not as a rule make a charge of the usual 5% commission, and that the practice of many banking and trust companies has been to make a charge sufficient to cover only the actual legal expenses, which for most foreclosures does not exceed $50.00.

[9] Mills v. Mutual Building & Loan Ass'n, 216 N. C. 664, 670, 6 S. E. (2d) 549, 553 (1940).

could be present in connection with the foreclosure until the foreclosure was commenced.

If the deed of trust be declared a mortgage at the time it comes into being with an employee of the creditor acting as trustee, would the substitution of an impartial trustee[10] convert the mortgage into a deed of trust? Although the court made no mention of this possibility, it would seem difficult to arrive at any other conclusion. If a defect in a deed of trust can change it into a mortgage, the same instrument should be sufficiently chameleon-like to resume, upon removal of the defect, its originally intended status.

Another possibility is that the deed of trust will be declared a mortgage only when an employee of the creditor bids in as trustee at the foreclosure sale. If so, perhaps creditors already holding such instruments need only have the bid made by some other party, in order to escape the holding of the principal case. If, however, the trustee is the managing officer of the creditor, it would be hard for anyone to bid in for the creditor except at the instance of the trustee, as such managing officer. As the court was concerned with substance rather than form, this contrivance would be fraught with the same dangers which proved disastrous in the principal case.

Another question raised by this decision is whether it means that for all purposes other than the one here under consideration a deed of trust will be held to be a mortgage where an employee of the creditor is named in the instrument as trustee. If so, one possible consequence is that a conveyance of the trust estate by the trustor to the *cestui,* or creditor, will be presumed to be fraudulent, just as a conveyance of the equity of redemption by the mortgagor to the mortgagee is presumed to be fraudulent.[11] It has been previously held in North Carolina that a conveyance of this sort under a trust deed arouses no presumption of unfairness.[12]

Not only building and loan associations, but other financial institutions as well, have acquired a great deal of real estate by virtue of foreclosure sales of the type condemned here.[13] In such situations, two remedial possibilities are present; the creditor institution might get a

[10] Substitution of trustees may be made under N. C. CODE ANN. (Michie, 1939) §§2583(a) *et seq.,* 4023. The validity of proceedings under §2583(a) *et seq.* has been declared in North Carolina Mortgage Corp. v. Morgan, 208 N. C. 743, 182 S. E. 450 (1935), and Pendergrast v. Home Mortgage Co., 211 N. C. 126, 189 S. E. 118 (1937).

[11] Note (1939) 17 N. C. L. REV. 295.

[12] Simpson v. Fry, 194 N. C. 623, 140 S. E. 295 (1927); Murphy v. Taylor, 214 N. C. 393, 199 S. E. 382 (1938).

[13] Correspondence reveals that the Home Owners Loan Corporation, for instance, has followed the practice of having its state manager named as trustee in such deeds of trust as it may hold, and under this arrangement has acquired a great deal of realty.

quit claim deed from the debtor whose property was sold at the foreclosure, or it might be feasible to get the legislature to validate such foreclosures in order that the effect of this case might not be retroactive and thereby throw a cloud upon such titles as the creditor institutions acquired.[14]

In practical effect, the deed of trust in North Carolina has come to be a mortgage in everything but form. This form, however, led to different consequences, as previously pointed out. The court in the principal case set out to justify the differences in consequences by attempting to put life back into the form by requiring an absolutely impartial trustee. It is submitted that perhaps it would have been better to have recognized conditions as they are; that in substance deeds of trust for security purposes are mortgages and are not likely to become anything more—except that this decision will require the formality of naming an outside party as trustee in the instrument. Would it not have been better to have abolished the distinction between mortgages and deeds of trust, already abolished in substance, and enable any mortgagee to bid in at the sale of the mortgaged premises?

HARRY MCMULLAN, JR.

Practice and Procedure—Appeals from Refusals of Motions to Dismiss—Special Appearances.

Defendant entered an appearance, designated as special, and moved to dismiss the action not only for lack of jurisdiction over the person, but also for lack of justification of plaintiff's bond for security for costs. The trial judge ordered the return of service stricken out and authorized the service of an alias summons. Defendant again entered an appearance, designated as special, and moved to dismiss the action and to strike out the return of summons for that there was no complaint filed, and there was no cost bond filed, and for that the summons was not an alias summons. Upon denial of this motion, defendant appealed to the North Carolina Supreme Court, which, without discussing the right to appeal, *held* the appearance to be special.[1]

The case raises two interesting questions in regard to North Carolina procedure: (1) when may a defendant appeal from a refusal of a motion to dismiss? (2) what constitutes a special appearance? (The

[14] 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (2d ed. 1904) §674 *et seq.* Examples of the operation of curative statutes appear in the following cases: Pinckney v. Morton, 30 F. (2d) 885 (C. C. A. 5th, 1929) (defect in execution or acknowledgment of deed, *held*, cured by curative statute); Bowman v. Geyer, 127 Me. 351, 143 Atl. 272 (1928) (deed without seal, *held*, validated by curative statute).

[1] Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

first motion to dismiss made by the defendant in the principal case raises the latter question while his second motion raises the former.)

1. WHEN MAY A DEFENDANT APPEAL FROM A REFUSAL OF A MOTION TO DISMISS?

In *Capps v. Atlantic Coast Line Railroad Company*[2] our court, stating what is apparently intended to be a rule of general application, said: "The uniform decisions of this Court have always been that 'no appeal lies from a refusal to dismiss'. . . . It is useless to cite cases, for they are very numerous and without exception."[3] In that case the motion to dismiss was not grounded on the alleged failure to obtain jurisdiction of the person of the defendant, but other decisions have applied this same rule to the latter type of case. It was held in *Plemmons v. Southern Improvement Company*[4] that no appeal lay from a refusal to dismiss proceedings as to a corporate defendant, although the court found that there had been no service on the defendant. A similar result was reached in *Guilford v. Georgia Company,*[5] where it was alleged that the notice of publication had not been published for a sufficient time, and in *Cooper v. Wyman,*[6] where the defendant had been served while in the state for the sole purpose of attending a trial in the North Carolina courts as party plaintiff. In the latter case the court pointed out that the proper procedure for the defendant is to appear specially and move to set aside the return of service and, if the motion is denied, to request the judge to find the facts and enter them on the record together with the exception to the ruling so that this may come up for review on the appeal from final judgment.[7]

In the case of *Cape Fear Railways v. Cobb,*[8] decided in 1925, an appeal was allowed from the refusal of a motion to dismiss for lack of

[2] 182 N. C. 758, 108 S. E. 927 (1921).

[3] In Underwood v. Dooley, 197 N. C. 100, 147 S. E. 819 (1929), where there was a similar procedural situation (answer setting up a former proceeding in bar and subsequent motion to dismiss), the appeal was allowed without discussion. Probably this case should be taken merely as one in which the court did not have the point called to its attention, as the *Capps* case has since been cited with approval. See Johnson v. Pilot Life Ins. Co., 215 N. C. 120, 1 S. E. (2d) 381 (1939).

[4] 108 N. C. 614, 13 S. E. 188 (1891).

[5] 109 N. C. 310, 13 S. E. 861 (1891) (defendant's prayer for an appeal had been refused; and the supreme court held that since no appeal lay, a writ of *certiorari* could not be granted as a substitute).

[6] 122 N. C. 784, 29 S. E. 947 (1898).

[7] *Id.* at 785, 29 S. E. at 947. The court said: "The motion to dismiss the action was properly refused, but the point relied on . . . should regularly have been raised by a motion to strike out the return of service. . . ." In view of this language, it would seem advisable to frame such motions as requests to strike out, set aside, or quash the return of service, or at least to include such language in the motion. Though some of the subsequent decisions seem to draw no distinction between such terms, note that in the principal case the motion was to set aside the return of service and to dismiss.

[8] 190 N. C. 375, 129 S. E. 828 (1925).

any valid service of process. Apparently, the grounds for the motion were that the defendant was a foreign corporation not doing business in the state, so that the attempted service on the secretary of state was, therefore, unauthorized, and that the person personally served was not its agent.[9] Chief Justice Stacy said: "The appeal, it will be noted, is from an order overruling a motion to dismiss, not upon the ground of irregular or defective service of summons, but for an alleged failure of any valid service of process at all, resulting in a want of jurisdiction over the defendant."[10] Two earlier North Carolina cases were cited: *Dailey Motor Company v. Reaves*[11] and *Lunceford v. Commercial Travelers Mutual Accident Association of America*.[12] In the first of these cases the court allowed an appeal from an order overruling a demurrer, entered on a "special appearance", based on the ground that there had been no service on defendant and on the further ground of lack of jurisdiction over the subject matter. It was found that the defendant, by virtue of his second ground, had entered a general appearance, which waived the first.[13] In the latter case the motion to dismiss was made upon the ground that the service on the secretary of state was unauthorized because the defendant insurance company was not doing

[9] One of the four methods of attempted service was by warrant of attachment on funds alleged to be the property of the defendant in the hands of a trustee. Had there been a motion to dismiss the attachment, there would be no doubt as to the right of the defendant to appeal from a refusal to grant the motion. Sheldon v. Kivett, 110 N. C. 408, 14 S. E. 790 (1892). An appeal will lie from the refusal of a motion to dismiss an attachment or to vacate an order of arrest. Such cases come within the purview of N. C. CODE ANN. (Michie, 1939) §638, which provides for appeals from orders or determinations which affect a substantial right.

[10] 190 N. C. 375, 376, 129 S. E. 828 (1925).

[11] 184 N. C. 260, 114 S. E. 175 (1922).

[12] 190 N. C. 314, 129 S. E. 805 (1925).

[13] N. C. CODE ANN. (Michie, 1939) §514 provides that either party may appeal from a ruling on a demurrer. However, the rule seems to be that an immediate appeal can be taken from a motion overruling a demurrer only when the demurrer goes to the whole cause of action or the whole defense. See Cody v. Hovey, 216 N. C. 391, 5 S. E. (2d) 165 (1939). Clearly, in the *Reaves* case, the demurrer for lack of jurisdiction of the subject matter goes to the whole cause of action, and this would justify appeal from the order overruling it.

The case indicates that if the ground of a demurrer is confined to lack of jurisdiction of the person, the demurrer can be employed under a special appearance. Assuming that such a situation arises, and that the demurrer is overruled, it can be strongly argued that this, also, is a demurrer which goes to the whole cause of action, in the sense that it would eliminate the necessity of litigating any part of the cause. Further, it may be conceded that there is little justification for drawing a distinction, for appeal purposes, between the overruling of a demurrer based on lack of jurisdiction over the person and the overruling of a motion based on the same ground. However, since a demurrer can be used only when the defect appears on the face of the complaint (N. C. CODE ANN., Michie, 1939) §511, it is not suitable in the average case where the objection is grounded on the absence of or defects in process.

Even if we assume that, for this purpose, demurrers and motions should receive like treatment, it does not eliminate the question raised by the *Cobb* case and subsequent cases discussed in the text.

business in the state. In this case the right to appeal was not mentioned. The *Cobb* case has been followed in subsequent North Carolina decisions without further explanation for the departure from the established rule.[14] In *Denton v. Vassiliades*[15] the appeal was allowed where the motion to dismiss was made upon the ground that there had been no proper service of process in that the affidavit of plaintiff upon which publication was authorized alleged that the return of the sheriff had been endorsed, "The defendants, after due diligence and search, cannot be found in Wake County."

The question arises, what is the difference between "irregular or defective service" and a "failure of any valid service"? Under the rule laid down by Chief Justice Stacy, an appeal will lie from a refusal of a motion to dismiss in the latter situation, but not in the former.

Viewing the cases, it is apparent that the difference is not that the service is voidable in the one situation and void in the other; it is not that it is irregular or defective rather than no service at all; and it is not that the defect fails to appear on the face of the record in the former case and does so appear in the latter. Yet another possible distinction might be suggested, namely: that an appeal will not lie when the defect is such as is subject to amendment, but only when it is such as to result in a total lack of jurisdiction over the person. But if this be the true test, the court will in every case necessarily decide the question of amendability by determining whether the appeal lies; and the appealing defendant will accomplish his purpose of getting a delay or obtaining a decision of the court as to the nature of the defect when his right to appeal is decided. If no appeal lies, then the defect is amendable, but if the appeal will lie, then it is fatal. The distinction can not be a valid one, for the court has in several cases permitted the appeal and at the same time affirmed the motion refusing to dismiss.[16]

It seems that if the defendant uses the proper words ("for lack of any valid service") the court must allow the appeal, unless it wishes to look beyond the form of the words and to the substance of the defect, in which case again a determination of the question of the right to appeal will be a determination of the nature of the defect.

The reason for the rule refusing appeals from the overruling of

[14] Leggett v. Federal Land Bank of Columbia, S. C., 204 N. C. 151, 167 S. E. 557 (1933); Reich v. Home Mortgage Corp., 204 N. C. 790, 168 S. E. 814 (1933); Ruark v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441 (1934); Denton v. Vassiliades, 212 N. C. 513, 193 S. E. 737 (1937); Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

[15] 212 N. C. 513, 193 S. E. 737 (1937).

[16] Lunceford v. Commercial Travelers Mutual Accident Ass'n of America, 190 N. C. 314, 129 S. E. 805 (1925); Cape Fear Rys. v. Cobb, 190 N. C. 375, 129 S. E. 828 (1925); Reich v. Home Mortgage Corp., 204 N. C. 790, 168 S. E. 814 (1933); Ruark v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441 (1934).

such motions has been stated to be that if they were allowed, a defendant could in every case get from six to eighteen months delay by such motion.[17] The same reason is applicable in all of the cases, regardless of whether it be said that the service is "irregular or defective" or "invalid".

If it be deemed that this reason is no longer of any force or that the rule itself is too harsh,[18] it is submitted that it would be better to discard it altogether than to attempt to evade it by drawing a distinction which appears to be without merit and, to date, without adequate explanation in the cases.

II. WHAT CONSTITUTES A SPECIAL APPEARANCE?

In *Scott v. Life Association*[19] the court said: "The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general."[20] In *Dailey Motor Company v. Reaves*[21] it was held that a demurrer for want or proper service, when coupled with the additional ground of want of jurisdiction over the subject matter, constituted a general appearance, the court saying that the second ground is considered *in law* as being taken to the merits and not merely to the jurisdiction of the court over the persons of the defendants. Other cases have held it to be a general appearance to answer to the merits,[22] to move for a change of venue,[23] to move for a restraining order,[24] to move to set aside the judgment and file an answer,[25] to move for a continuance,[26] to demur to the sufficiency of the complaint,[27] to give a replevy bond in attachment,[28] to move to set aside a judgment on the ground of excusable neglect,[29] or to move to dismiss (because brought in the wrong county) or, if the motion is refused, to have the case

[17] Capps v. Atlantic Coast Line R. R., 182 N. C. 758, 108 S. E. 927 (1921).
[18] In so recent a case as Johnson v. Pilot Life Ins. Co., 215 N. C. 120, 1 S. E. (2d) 381 (1939) our court applied the rule that no appeal lies from a refusal to dismiss and reiterated the reason for the rule, pointing out that the court was not there dealing with a jurisdictional question.
[19] 137 N. C. 515, 50 S. E. 221 (1905).
[20] *Id.* at 518, 50 S. E. at 222.
[21] 184 N. C. 260, 114 S. E. 175 (1922).
[22] Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1 (1916).
[23] Grant v. Grant, 159 N. C. 528, 75 S. E. 734 (1912).
[24] McDowell v. Justice, 167 N. C. 493, 83 S. E. 803 (1914).
[25] Currie v. Golconda Mining & Milling Co., 157 N. C. 209, 72 S. E. 980 (1911).
[26] Barnhardt v. East Avenue Drug Co., 180 N. C. 436, 104 S. E. 890 (1920).
[27] Shaffer v. Morris Bank, 201 N. C. 415, 160 S. E. 481 (1931).
[28] Bizell v. Mitchell, 195 N. C. 484, 142 S. E. 706 (1928).
[29] Dell School v. Peirce, 163 N. C. 424, 79 S. E. 687 (1913).

removed.[30] On the other hand, it has been held that a motion for a continuance for the sole purpose of giving an opportunity to appear and move to dismiss for want of jurisdiction of the person is not a general appearance.[31] To the same effect is the case of *Winder v. Penniman*,[32] where a non-resident defendant filed a replevy bond for the return of his property which was attached while he was in the state solely for the purpose of attending court as a party to the proceeding.

It seems that for an appearance to be called special it must relate to a procedural question, and it must be such as to preclude the idea that the defendant intends to enter a plea to the merits. Both elements are essential.

In the principal case the defendant coupled with his motion to dismiss for lack of jurisdiction of his person the further purpose to dismiss for failure to justify plaintiff's bond as security for costs. It was held that the matter of moving to dismiss the action for failure to comply with the statutory requirement relating to security for costs pertains to a procedural question, apart from the merits of the action, and that such motion may be invoked as incidental to jurisdiction.[33] If, as this language seems to indicate, any motion pertaining to a procedural question will constitute a special appearance, then the court is laying down a new doctrine which goes far beyond previous North Carolina decisions, and which is in direct conflict with many of them. For example, the earlier cases holding that motions for continuance or change of venue constituted general appearances clearly presented only procedural questions not necessarily involving the merits. However, those motions did not preclude the idea that the defendant might plead to the merits. By contrast, in the principal case, the motion was to dismiss the action, which precludes an intention to plead to the merits (unless forced to do so), and the case should probably be construed in that light. In this respect it can be said to be similar to the case involving the motion for a continuance for the sole purpose of giving an opportunity to appear specially and attack jurisdiction of the person.

As pointed out in the opinion, there is a conflict of authority in other jurisdictions.[34] It is submitted that our court has adopted the better view, and one which is entirely consistent with the other North

[30] Grant v. Grant, 159 N. C. 528, 75 S. E. 734 (1912).
[31] Warlick v. Reynolds, 151 N. C. 606, 66 S. E. 657 (1909).
[32] 181 N. C. 7, 105 S. E. 884 (1921).
[33] Mintz v. Frink, 217 N. C. 101, 104, 6 S. E. (2d) 804, 807 (1940).
[34] Holding such an appearance to be special are: Collier v. Morgan's L. & T. R. R. Steamship Co., 41 La. Ann. 37, 5 So. 537 (1889); Wendel v. Connor, 220 App. Div. 211, 221 N. Y. Supp. 10 (1st Dep't, 1927). *Contra:* Healy v. C. Aultman & Co., 6 Neb. 349 (1877); Raymond Bros. v. Strine, 14 Neb. 236, 15 N. W. 350 (1883); Stonach v. Glessner, 4 Wis. 275 (1855).

Carolina cases, but that the language used to support it is too broad and will not be employed in subsequent decisions for the purpose of greatly liberalizing the rule as to what constitutes a special appearance.

MARSHALL V. YOUNT.

Torts—Licensee and Invitee—Determination of Status of Visitor Upon Premises.

Plaintiff entered defendant's drug store for the purpose of making a purchase and using the telephone. As all the clerks were busy, she did not make her purchase; but, permission to use the telephone having been granted by the manager, she went to the prescription room where it was situated. In reaching inside the room to pick up the telephone, she leaned against a swinging door which opened under her weight, causing her to lose her balance and fall inside and down a trapdoor which had been left open. Plaintiff sued defendant for the injuries resulting from the fall. *Held,* verdict should be directed for the defendant because the plaintiff was a mere licensee when she went to the prescription room, and, as such, defendant owed her only the duty not to wilfully or wantonly injure her.[1]

The point on which the instant case turned was whether plaintiff was an invitee or a licensee. Once this point has been determined, the law is well settled as to the duty owed to either. To a licensee, the occupier of premises owes no duty except to refrain from wilful or wanton injury,[2] by which the courts probably mean, when discussing a case in which the injury occurs because of the condition of the premises, that the occupier must use reasonable care to refrain from allowing the licensee to walk into a trap or hidden peril that is known by the occupier to be on the premises. Once the owner knows that the licensee is on the premises, he must use reasonable care to avoid injuring him by a positive act of negligence or a failure of duty which is the equivalent of such an act.[3] However, while the owner of the premises is not the insurer of an invitee's safety, he has a duty to use reasonable care to keep the premises safe for the use of the invitee.[4] Such care

[1] McMullen v. M. & M. Hotel Co., 290 N. W. 3 (Iowa, 1940).

[2] Medcraft v. Merchant's Exchange, 211 Cal. 404, 295 Pac. 822 (1931); Wilson v. Goodrich, 218 Iowa 462, 252 N. W. 142 (1934); Wall v. F. W. Woolworth Co., 209 Ky. 258, 272 S. W. 730 (1925); Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N. W. 602 (1932); Lange v. St. John's Lumber Co., 115 Ore. 337, 237 Pac. 696 (1925).

[3] Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931); HARPER, TORTS (1933) §95.

[4] Farmer's & Merchant's Warehouse Co. v. Perry, 218 Ala. 223, 118 So. 406 (1928); Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931); Isaac Benesch & Sons v. Ferkler, 153 Md. 680, 139 Atl. 557 (1927); Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 Atl. 282 (1929); Crane v. Jorden Marsh Co., 269 Mass.

must be exercised with regard to all entrances and exits ordinarily used in going to and from the premises.[5]

Generally, it is held that an invitee is one who goes on the premises of another at the other's invitation, express or implied, and for the mutual benefit of both the owner and himself,[6] while a licensee is a person who goes on the premises out of curiosity or for his personal benefit alone, even though he may have the owner's express permission.[7]

Kennedy v. Phillips,[8] a Missouri case, lays down the following definition of invitation: "The word 'invitation' . . . covers and includes in it enticement, allurement, and inducement, if the case in judgment holds such features. Also the invitation may be implied from a dedication, or it may arise from a known customary use. So, too, it is held in all the cases that the invitation may be implied by any state of facts upon which it naturally and reasonably arises."[9] Under a rule such as this, employees are held to be invitees,[10] and customers entering a store, whether their purpose is to make a purchase or merely to inspect the goods, are also invitees and not licensees.[11]

The doctrine of customary use seems to be an exception to the general rule of mutuality of benefit. The case of *Smith v. Jewell Cotton Mill Company*[12] lays down the rule that an invitation may be implied from customary use even though the injured person may be in a place where, in other circumstances, he would not be allowed. So,

289, 169 N. E. 136 (1929); Glenn v. W. T. Grant Co., 129 Neb. 173, 260 N. W. 811 (1935).

[5] Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N. W. 99 (1922).

[6] Brinkworth v. Sam Seilig Co., 51 Cal. App. 668, 197 Pac. 427 (1921); Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 Pac. 618 (1923); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N. W. 99 (1922); Wilson v. Goodrich, 218 Iowa 462, 252 N. W. 142 (1934); L. E. Myer's Co. v. Logués Adm'r, 212 Ky. 802, 280 S. W. 107 (1926); Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 Atl. 282 (1929).

[7] Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N. W. 99 (1922); Wilson v. Goodrich, 218 Iowa 462, 252 N. W. 142 (1934); L. E. Myer's Co. v. Logués Adm'r, 212 Ky. 802, 280 S. W. 107 (1926); Foshee v. Grant, 152 La. 203, 93 So. 102 (1922); Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N. W. 602 (1932); Lange v. St. John's Lumber Co., 115 Ore. 337, 237 Pac. 696 (1925).

[8] 319 Mo. 573, 5 S. W. (2d) 33 (1928).

[9] *Id.* at 585, 5 S. W. (2d) at 37.

[10] Robinson v. Maryland Coal & Coke Co., 196 Ala. 404, 72 So. 161 (1916).

[11] Brinkworth v. Sam Seilig Co., 51 Cal. App. 668, 197 Pac. 427 (1921); Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931); Hall v. The Great Atlantic & Pacific Tea Co., 115 Conn. 698, 160 Atl. 302 (1932); Bridgford v. Stewart Dry Goods Co., 191 Ky. 557, 231 S. W. 22 (1921); Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 Atl. 282 (1929); Blease v. Webber, 232 Mass. 165, 122 N. E. 192 (1919); Grogan v. O'Keeffe's, Inc., 267 Mass. 189, 166 N. E. 721 (1929); Crane v. Jorden Marsh Co., 269 Mass. 289, 169 N. E. 136 (1929); Kennedy v. Phillips, 319 Mo. 573, 5 S. W. (2d) 33 (1928); Glenn v. W. T. Grant Co., 129 Neb. 173, 260 N. W. 811 (1935).

[12] 29 Ga. App. 461, 116 S. E. 17 (1923).

where a customer has used a toilet[13] or a telephone[14] that is placed on the premises for the customers' use, he is an invitee even though his purpose in using the facility involves no mutual benefit to the owner. One court[15] has held that a customer in a store who asked for and received permission to use a toilet that was provided for the employees, though customers sometimes made use of it, was an invitee and could recover for injuries received. This latter case seems to be in the minority, however, for other cases hold that a customer who uses a telephone or a toilet which is ordinarily used only by employees is a licensee.[16]

From the above, it is clear that what distinguishes an invitee from a licensee is an invitation made out through some mutuality of benefit or by some known customary use. This rule seems to be fair, since it is neither just nor reasonable to hold an owner liable to persons coming on the premises for their benefit alone, unless he has made it clear that the facilities are to be used by the public.

In many cases it has been held that when a person enters the premises as an invitee, but exceeds his invitation, he then becomes a licensee and must take the premises as he finds them.[17] These holdings are based on the rule that an invitation extends only to those parts of the building to which an invitee would ordinarily go in the course of his business, so that when he exceeds these bounds his status is reduced to that of a licensee.[18] *Ellington v. Ricks*,[19] a North Carolina case, lays down the following rule applicable to the situation: "If an invitee goes to 'out-of-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand' and is injured, there is no liability . . . , but a slight departure by him 'in the ordinary aberrations or casualties of travel' do not change the rule or ground of liability. . . ."[20] In that case the court allowed recovery when the plaintiff, while putting in a machine for the defendant, stepped away from the spot a few minutes to inspect an old boiler and was injured.

[13] McCluskey v. Duncan, 216 Ala. 388, 113 So. 250 (1927).
[14] Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931).
[15] Main v. Lehman, 294 Mo. 579, 243 S. W. 91 (1922).
[16] Corbett v. Spanos, 32 Cal. App. 200, 173 Pac. 769 (1918); Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N. W. 602 (1932); Liveright v. Max Lifsitz Furn. Co., 117 N. J. Law 243, 187 Atl. 583 (1936).
[17] Corbett v. Spanos, 32 Cal. App. 200, 173 Pac. 769 (1918); Medcraft v. Merchant's Exchange, 211 Cal. 404, 295 Pac. 822 (1931); Wilson v. Goodrich, 218 Iowa 462, 252 N. W. 142 (1934); Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N. W. 602 (1932).
[18] Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 Pac. 618 (1923); Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N. W. 99 (1922); Grogan v. O'Keeffe's, Inc., 267 Mass. 189, 166 N. E. 721 (1929); Chichas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 Pac. 361 (1925); Liveright v. Max Lifsitz Furn. Co., 117 N. J. Law 243, 187 Atl. 583 (1936).
[19] 179 N. C. 686, 102 S. E. 510 (1920). [20] *Id.* at 690, 102 S. E. at 511.

Cases in which the general rule as to exceeding the invitation of the owner has been applied include *Corbett v. Spanos*,[21] a case arising in California, in which the plaintiff, a customer in the store, asked for and received permission to use a toilet that was used by employees only and was injured there, and *Collins v. Sprague's Benson Pharmacy*,[22] a Nebraska case with a similar fact situation. Both courts denied a recovery on the ground that the defendant's duty to the plaintiff extended only to the part of the building used for business purposes, and the plaintiff had gone beyond the bounds of her invitation.

Courts have applied the rule to other fact situations. Where a customer in a barroom went into a wareroom situated in back of the bar and was injured there, he could not recover, even though drinks were sometimes sold to customers in this wareroom.[23] Again, a customer in a building on business, who was injured in a dark room to which access was prohibited while searching for a washroom used by customers was held to be a licensee and could not recover.[24]

In *Keeran v. Spurgeon Mercantile Company*,[25] where the plaintiff left his bags in the store and, on returning to get them, went into a part of the building not open to customers, and was injured, the court held that he was a licensee and could not recover. And, in *Wall v. F. W. Woolworth Company*[26] the court required the plaintiff to prove the fact that the stairs on which he was injured were open to the use of customers before he could recover, saying that if he used stairs not open to customers, he was a mere licensee and must take the premises as he found them.

Applying these rules to the instant case the principal question is: Did the plaintiff go beyond the scope of her invitation as a customer when she attempted to use the telephone in the prescription room? The evidence bearing on this shows that the phone had been used by customers of the store before, and it is clear that she did not go out of the room used as the drugstore proper until she fell through the swinging door into the prescription room and then on down through the trapdoor. With these facts, the court could have found authority[27] for, and would have reached a much fairer result if it had left to the jury the question of whether the plaintiff was injured before or after she lost her status as an invitee.

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[21] 32 Cal. App. 200, 173 Pac. 769 (1918).
[22] 124 Neb. 210, 245 N. W. 602 (1932).
[23] Foshee v. Grant, 152 La. 303, 93 So. 102 (1922).
[24] Medcraft v. Merchants Exchange, 211 Cal. 404, 295 Pac. 822 (1931).
[25] 194 Iowa 1240, 191 N. W. 99 (1922).
[26] 209 Ky. 258, 272 S. W. 730 (1925).
[27] Thistlewaite v. Heck, 75 Ind. App. 359, 128 N. E. 611 (1920); Chichas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 Pac. 361 (1925).

Torts—Negligence—Power Companies—Degree of Care Owed Customers.

Lightning having destroyed wires in the house of one of the defendant company's customers, he notified the defendant, whose employee came and tied back the wires from the house so that no electricity could enter the house wiring system. Defendant told the customer to have his own wiring fixed, and then to call defendant, who would reconnect the service. The customer employed an electrician who made repairs, and, contrary to defendant's rules, connected defendant's wires to the house system. In so doing, he negligently crossed the wires, thus energizing a cable inside the house. Seven days after the storm occurred, plaintiff's intestate, the four-year-old grandchild of the owner, while under the house, came in contact with the energized cable and was electrocuted. Requiring of the defendant a "high degree of foresight", the North Carolina Supreme Court, with two justices dissenting, *held* that it was liable for the death because of its negligence, in that it should have known that the service had been restored by the electrician, and, consequently, had a duty to inspect its service within a reasonable time. The negligence of the electrician was held not to be such as would insulate the defendant's lack of care.[1]

Although the rule as to the duty required of businesses supplying electricity in looking after their instrumentalities has been variously expressed by the North Carolina court,[2] it seems safe to conclude from the cases as a whole that generally the "highest degree of care",[3] up to the point where any more caution would hamper proper operation, is necessary to protect the company from liability.[4] The court has held that a judge's instruction that defendant's duty is to exercise "ordinary care" is insufficient,[5] but has declared that such a high requirement does not in any way make for a varying standard of duty. The standard is always that care which a reasonable or prudent man would use under

[1] Kiser v. Carolina Power & Light Co., 216 N. C. 698, 6 S. E. (2d) 713 (1940).

[2] Small v. Southern Public Utilities Co., 200 N. C. 719, 158 S. E. 385 (1931) (where the court's various expressions of what constitutes proper care are collected).

[3] Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911); Benton v. North Carolina Public-Service Corp., 165 N. C. 354, 81 S. E. 448 (1914); Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 31 (1924); Graham v. Sandhill Power Co., 189 N. C. 381, 127 S. E. 429 (1925); Murphy v. Carolina Power & Light Co., 196 N. C. 484, 146 S. E. 204 (1929).

[4] Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910), 32 L. R. A. (N. S.) 848 (1911); Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 31 (1924); *cf.* Parker v. Charlotte Electric Co., 169 N. C. 68, 85 S. E. 33 (1915).

[5] Turner v. Asheville Power & Light Co., 167 N. C. 630, 83 S. E. 744 (1914).

similar circumstances.[6] The reasonable man, knowing of the hidden dangers of electricity, should exercise more care in dealing with it than in dealing with a different, less deadly instrumentality. The company's duty is one of continuing inspection and care,[7] in order to assure the fullest possible protection to people wherever they have a right to be.[8] A company cannot escape this legal duty. Without legislative sanction (and there is none) any contract made for the purpose of escaping or shifting liability for negligence is void as against public policy.[9]

Because of the lack of knowledge of the qualities of electricity on the part of the general public, the court often applies the doctrine of *res ipsa loquitur* to cases involving injury by electricity.[10] When this doctrine is invoked, proof of the injury and the surrounding circumstances—often, in the nature of things, all that the plaintiff can know of the accident—will carry the question of the defendant's negligence to the jury.[11] The defendant must then go forward with his evidence, although the burden of proof is still on the plaintiff, or risk an almost certain adverse verdict.[12] An example of the working of this doctrine is found in the case of *Turner v. Southern Power Company*,[13] where plaintiff, as had been his custom for years, took hold of a light bulb in his store and was injured. The internal wiring of the store being shown to be in good order, a perfect situation arose for burdening the defendant with the duty of going forward and showing its exercise of the proper care required of it.

The largest class of cases involving liability of power companies for

[6] Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910), 32 L. R. A. (N. S.) 848 (1911); Small v. Southern Public Utilities Co., 200 N. C. 719, 158 S. E. 385 (1931).

[7] Houston v. Durham Traction Co., 155 N. C. 4, 71 S. E. 21 (1911); Ramsey v. Carolina-Tennessee Power Co. and Louisville & N. Ry., 195 N. C. 788, 143 S. E. 861 (1928).

[8] Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163 (1927); *cf.* Benton v. North Carolina Public-Service Corp., 165 N. C. 354, 81 S. E. 448 (1914).

[9] Collins v. Virginia Power & Electric Co., 204 N. C. 320, 168 S. E. 500 (1933); see Turner v. Southern Power Co., 154 N. C. 131, 136, 69 S. E. 767, 769 (1910).

[10] Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 31 (1924); Murphy v. Carolina Power & Light Co., 196 N. C. 484, 146 S. E. 204 (1929); Collins v. Virginia Power & Electric Co., 204 N. C. 320, 168 S. E. 500 (1933); Lynn v. Pinehurst Silk Mills, Inc., 208 N. C. 7, 179 S. E. 11 (1935).

[11] Ramsey v. Carolina-Tennessee Power Co. and Louisville & N. Ry., 195 N. C. 788, 143 S. E. 861 (1928); Murphy v. Carolina Power & Light Co., 196 N. C. 484, 146 S. E. 204 (1929).

[12] Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); *cf.* Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810 (1894).

[13] 154 N. C. 131, 69 S. E. 767 (1910), 32 L. R. A. (N. S.) 848 (1911).

negligent injuries arises where a person comes into contact with a defendant company's power lines used to transmit current. These lines usually fall,[14] sag,[15] or become uninsulated[16] at some place that is accessible to and frequented by the public. Defendant's liability is predicated upon actual notice of the defect,[17] or on its failure to observe the high degree of care imposed on it by law, which is the employment of continuing inspections. The result is that it is charged with constructive knowledge of the dangerous condition which is in such a place that one might reasonably expect passers-by to come into contact with it.[18] The great majority of these cases involve children away from home coming into contact with such defective wires, usually in the course of their play. In such situations the court is very strict, holding a defendant to have notice of the fact that children will pick up wires from the ground,[19] and that they will play in certain places near wires, such as in the street, or in a tree,[20] or on a sawdust pile.[21] As a consequence, the doctrine of attractive nuisance is generally invoked in regard to defective wires located in such places. While a power company is liable to adult trespassers only for wilful or wanton injuries,[22] apparently no defense of trespass is available where children are involved. In such cases this defense is considered a mere technicality, and disappears before the attractive nuisance theory.[23] It should not be concluded, however, that a power company has an absolute liability as regards children. Where the defendant has exercised every possible care in the disposition of its wires, the unforeseeable contact of even a child with the wires will not be the basis for liability.[24]

[14] Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342 (1906); *cf.* Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911).

[15] Harrington v. Commissioners of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910); *cf.* Murphy v. Carolina Power & Light Co., 196 N. C. 484, 146 S. E. 204 (1929).

[16] Graham v. Sandhill Power Co., 189 N. C. 381, 127 S. E. 429 (1925); *cf.* Mitchell v. Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398 (1901) (where ordinance required insulated electric wires, telephone company employee only required to look for patent defects); Ragan v. Durham Traction Co., 170 N. C. 92, 86 S. E. 1001 (1915).

[17] *Cf.* Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342 (1906).

[18] Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911); Graham v. Sandhill Power Co., 189 N. C. 381, 127 S. E. 429 (1925).

[19] Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163 (1927).

[20] Benton v. North Carolina Public-Service Corp., 165 N. C. 354, 81 S. E. 448 (1914).

[21] Graham v. Sandhill Power Co., 189 N. C. 381, 127 S. E. 429 (1925).

[22] Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911); Sumner v. Asheville Telephone & Telegraph Co. and Henderson Power & Light Co., 173 N. C. 28, 91 S. E. 354 (1917).

[23] Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911); *cf.* Arrington v. Town of Pinetops and Hookerton Terminal Co., 197 N. C. 433, 149 S. E. 549 (1929).

[24] Parker v. Charlotte Electric Ry., 169 N. C. 68, 85 S. E. 33 (1915).

Contributory negligence enters prominently into this class of cases, and again children are given the greatest protection. A person of mature age who meddles with wires will be prevented from recovering if it can be shown that he should have known and appreciated the danger of his acts.[25] But, if even a mature person touches a wire in ignorance of its condition and nature, he is not negligent.[26] A child can be held only to such care and prudence as is found to be usual among other children of his age, capacity, and experience.[27] It is not enough that defendant warns small children to stay away.[28] Neither is is contributory negligence as a matter of law for a parent to allow a child to play outside the house without watching him constantly.[29]

A second group of cases presents the problem of injuries occurring within the customer's building due to the improper emergence of electricity therein. Usually the injury results from a voltage of electricity in excess of what the customer contracted for or was supposed to receive. In such a situation the defendant power company is held liable where it has failed to use the required care in the inspection of its properties outside the house, thus causing the negligent transmission of the extra current through the internal wiring.[30] However, if the wrongfully dangerous behavior of the electricity can be traced to some defect in the internal wiring of the customer's house, the power company is not responsible in the absence of some showing of positive duty on its part to maintain the wires inside the house.[31] Such a duty is rarely

[25] King v. Manetta Mills Co., 210 N. C. 204, 185 S. E. 647 (1936); *cf.* Stanley v. Tidewater Power Co., 209 N. C. 829, 185 S. E. 5 (1936)) (where a drunk who knocked down a wire with his car, and later returned to the car and was injured by the wire, was held contributorily negligent).

[26] Mitchell v. Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801 (1901), 55 L. R. A. 398 (1902); *cf.* Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810 (1894).

[27] Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810 (1894); Harrington v. Commissioners of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910); *cf.* Benton v. North Carolina Public-Service Corp., 165 N. C. 354, 81 S. E. 448 (1914); Graham v. Sandhill Power Co., 189 N. C. 381, 127 S. E. 429 (1925).

[28] Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911).

[29] *Ibid.*

[30] Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910), 32 L. R. A. (N. S.) 848 (1911); Houston v. Durham Traction Co., 155 N. C. 4, 71 S. E. 21 (1911); Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 31 (1924); Lynn v. Pinehurst Silk Mills, Inc., 208 N. C. 7, 179 S. E. 11 (1935); *cf.* Collins v. Virginia Power & Electric Co., 204 N. C. 320, 168 S. E. 500 (1933); Ramsey v. Carolina-Tennessee Power Co. and Louisville & N. Ry., 195 N. C. 788, 143 S. E. 861 (1928).

[31] Cochran v. Young-Hartsell Mills Co., 169 N. C. 57, 85 S. E. 149 (1915); *cf.* Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910), 32 L. R. A. (N. S.) 848 (1911); Shaw v. North Carolina Public-Service Corp., 168 N. C. 611, 84 S. E. 1010 (1915); see McAllister v. Pryor, 187 N. C. 832, 838, 123 S. E. 92, 95 (1924).

found to exist; even the fact that the power company has inspected the house wiring at the owner's request does not necessarily show any duty to do so.[32] To clarify the trial of this class of cases, the North Carolina Supreme Court has suggested that it would be well for the court to submit to the jury, not only the issue as to the defendant's negligence, but also a separate issue as to the control over the wire from which the plaintiff received his injury.[33] It is doubtful whether such procedure would aid a great deal, however, in view of the fact that control over the wire is necessarily an important factor in determining the negligence issue itself.

If the excess of electricity is of such a dangerous degree that perfect internal wiring would not have prevented the accident, then a defect within the house does not relieve the power company of responsibility.[34] Conversely, a defendant was not held liable for negligent transmission where the plaintiff's own acts in regard to his house wiring amounted to a negligent disregard of his safety.[35]

Assuming, as the majority of the court did, that an inspection by the defendant of its wires at the point of connection with the house would have revealed the dangerous crossing of wires, it seems, on principle, that the majority reached the correct result in the instant case in view of the court's strict rules of care and inspection. The opinion is based on a duty to inspect after the customer had had the wiring connected, although no actual notice of such connection was given the defendant. This comes close to imposing on power companies a continuing duty of inspection in every case where wiring is disconnected. It is doubtful whether the court would carry the decision to its logical conclusion, as, for example, if the injury had occurred within a few hours of the making of the connections. Considering that in the instant case the owner was expressly instructed that the defendant itself would reconnect the service when called, it might well be argued with the dissent that to foresee what actually happened would require "a degree of prevision bordering on the omniscient . . . ", and, as a consequence, imposes an over-burdening duty of inspection on the defendant. The court apparently felt that the plaintiff should not bear the loss, and therefore allowed the responsibility to fall where it would be the least painful.

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[32] Merritt v. Tide Water Power Co., 205 N. C. 259, 171 S. E. 90 (1933); *cf.* Bradshaw v. Tidewater Power Co., 205 N. C. 850, 172 S. E. 412 (1934).
[33] Turner v. Asheville Power & Light Co., 167 N. C. 630, 83 S. E. 744 (1914).
[34] See McAllister v. Pryor, 187 N. C. 832, 838, 123 S. E. 92, 95 (1924).
[35] Rushing v. Southern Public Utilities Co., 203 N. C. 434, 166 S. E. 300 (1932).

Wills—Adverse Possession by Witness-Devisee Disqualified to Take Under the Will—Invalid Portion of Will as Color of Title.

Testator, by will probated in 1879, devised 50 acres of his home place to his daughter, Gertie, and the remaining 50 acres to his son, Newton. Both devises were in severalty and in fee, and were followed by the proviso "that if either Gertie or Newton should die without a lawful heir of their own body, or of the issue of same, the other heirs [probably used as a verb] the whole farm." Newton was one of the witnesses to the will. He went into possession of the share allotted him by the will, and later acquired by deed from Gertie her testamentary share; he conveyed the entire premises in 1899 and 1900 to the defendant, Williams, who entered and remained in possession until the commencement of this action. Newton died childless in 1931. The plaintiff is the only child and heir at law of Gertie, and claimed the 50 acres originally devised to Newton by virtue of the proviso contained in the will. The defendants claimed title by adverse possession, going back to Newton's original possession of the premises. At the first trial there was a directed verdict for the plaintiff,[1] and at the second trial a verdict was directed for defendant.[2] On appeal, both judgments were remanded, with the direction that the question of adverse possession by defendant and his antecedent was for the jury.

By statute in North Carolina, if the witness to a will is also a beneficiary thereunder, or his or her spouse is a beneficiary, the devise to the witness or spouse is void, but the witness is competent to prove the validity or invalidity of the will.[3] Thus, the witness-devisee is eliminated as a possible holder under the will. There are, however, two possibilities by which the recipient of the void devise may legally acquire the property, or a part of it: as an heir according to the rules of intestate succession, or as an adverse possessor.

At common law, by the majority view, void devises passed as intestate property.[4] Under a North Carolina statute, a void devise of real estate or any interest therein passes by the residuary clause (if any) of the will, "unless a contrary intention shall appear by the will".[5] The statute fails to indicate what disposition is to be made of void devises when there is no residuary clause in the will, but, since a lapsed or void residuary devise becomes intestate property,[6] probably the common law rule would govern the void primary devise, and convert it into intestate

[1] Barrett v. Williams, 215 N. C. 131, 1 S. E. (2d) 366 (1939).
[2] Barrett v. Williams, 217 N. C. 175, 7 S. E. (2d) 383 (1940).
[3] N. C. CODE ANN. (Michie, 1939) §4138.
[4] ATKINSON, WILLS (1937) 735, n. 45.
[5] N. C. CODE ANN. (Michie, 1939) §4166.
[6] ATKINSON, WILLS (1937) 734, 735, n. 43.

property.[7] Thus, if the void devise can be treated as intestate property and if the devisee is an heir of the testator under the intestate succession laws, he may still take his proportionate share of the property so devised, in the absence of a contrary intention appearing in the will. Obviously the quantum of the estate passing by intestacy would correspond to that originally devised by the testator, unless by virtue of the character of its creation, the estate terminates upon its failure to pass as a testamentary disposition, leaving nothing to pass as intestate property which a witness-devisee might gain as heir.[8]

If the devisee cannot qualify as an heir or if, even though he is an heir, there is no estate to be inherited by virtue of the cessation of such estate followed by immediate vesting of the next estate limited, the only other opportunity open to him, by which he can legally obtain title, is to occupy the property adversely for the statutory period.

Seemingly there could be no question of the ability of the beneficiary of the void devise to go into adverse possession of the property, since the result of the voiding statute is to cut off all his relation to the will as a beneficiary thereunder, and in effect to make him a complete stranger to the title. There would, therefore, be no relationship which he would have to renounce or which, unrebutted, would make a prima facie case of possession subordinate to the legal title.[9] Thus, a witness-devisee could gain good title by an occupation sufficient under the law to constitute adverse possession for the statutory period.

[7] ATKINSON, WILLS (1937) 733, nn. 33, 34; 735, n. 44.

[8] It is said that the void devise passes as intestate property. Perhaps this is an incorrect way to describe what happens in the instant situation. In fact, the property passes to the heirs as intestate property, subject to the terms of the will which have not been held to be invalid. Where the will has provided a life estate followed by a vested remainder, and the life estate is terminated, that is, held invalid, by reason of the recipient thereof being a witness to the will, the vested remainder validly provided by the will would be accelerated, and the owners thereof would immediately have the right to possession of the property as remaindermen under the will. Hinkley v. House of Refuge, 40 Md. 461 (1874); Adams v. Gillespie, 55 N. C. 244 (1855); Holderby v. Walker, 56 N. C. 46 (1856); Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47 (1903); Young v. Harris, 176 N. C. 631, 97 S. E. 609 (1918); Cheshire v. Drewry, 213 N. C. 450, 197 S. E. 1 (1938); Key v. Weathersbee, 43 S. C. 414, 21 S. E. 324 (1895); Jull v. Jacobs, 3 Ch. D. 703 (1876); see Compton v. Rixey, 124 Va. 548, 553, 98 S. E. 651, 652 (1919). If there is no acceleration, then the heirs would take the property subject to the subsequent vesting of the next estate validly limited. If that estate is an executory devise, upon occurrence of the contingency which vests the executory devise, the estate of the heirs would end. If the next estate was a contingent remainder, the termination of the particular estate supporting it would destroy the remainder in those states having the destructibility rule, and the property would then revert to the owner or his heirs in fee. See notes 27 and 28, *infra*. Thus, the heirs take as intestate property only so much of an estate in the property as has not been validly disposed of by the will.

[9] N. C. CODE ANN. (Michie, 1939) §433 and annotations; Lee v. Lee, 196 Ala. 522, 72 So. 24 (1916).

Assuming, then, that the excluded devisee may claim by adverse possession, there arises the question of the character of possession required of him. North Carolina apparently takes the view that there must be acts by the claimant which show his intention to exercise exclusive control over the property, at least for the time being.[10] Although the requirement of a claim of title has been mentioned in some North Carolina decisions,[11] what is probably meant is an intention to appropriate and hold the land as owner to the exclusion, rightfully or wrongfully, of the rightful owner.[12] Some states require a claim of ownership as against everyone else,[13] but North Carolina limits its requirement to a claim only against the rightful owner.[14] At common law a disseisor had to claim at least a freehold estate.[15] Probably the modern view is merely that an adverse possessor cannot bar the true owner by a claim subservient to the fee of that owner,[16] but this would not preclude him from claiming adversely a life estate or a lesser estate so long as he claims that estate as against the fee of the rightful owner.[17]

The net result of the above is that in North Carolina the witness-devisee can claim either as owner of the property itself, not specifying the estate claimed, which would probably be a fee simple claim, or he may claim as owner of the particular estate which he would have gotten by the will, the latter being as much a claim of exclusive ownership as the former. In either case, such possession for the statutory period would bar the rights of the true owners of that estate in the property. Of course, in those states requiring a claim of fee simple title,[18] or ownership as against the whole world,[19] the claimant would have to claim more than the estate which he was intended to take by the will, if that estate was less than a fee simple.

This, however, does not dispose of the question whether the will might serve as color of title. There are very few cases where a will

[10] Loftin v. Cobb, 46 N. C. 406 (1854); Bland v. Beasley, 145 N. C. 168, 58 S. E. 993 (1907); Locklear v. Savage, 159 N. C. 236, 74 S. E. 347 (1912); Snowden v. Bell, 159 N. C. 497, 75 S. E. 721 (1912); see Williams v. Buchanan, 23 N. C. 535, 537 (1841).

[11] Bland v. Beasley, 145 N. C. 168, 58 S. E. 993 (1907); Vanderbilt v. Chapman, 175 N. C. 11, 94 S. E. 703 (1917).

[12] See TIFFANY, REAL PROPERTY (3d ed. 1939) §1147.

[13] Hunnewell v. Burchett, 152 Mo. 611, 54 S. W. 487 (1899).

[14] Snowden v. Bell, 159 N. C. 497, 75 S. E. 721 (1912).

[15] See Costigan, *Conveyance of Lands by Disseisee* (1906) 19 HARV. L. REV. 267, 268, 269.

[16] TIFFANY, REAL PROPERTY (3d ed. 1939) §1151.

[17] Reynolds v. Trawick, 201 Ala. 449, 78 So. 827 (1918); Hanson v. Johnson, 62 Ind. 25 (1884); Charles v. Pickens, 214 Mo. 212, 112 S. W. 551 (1908); Board v. Board, L. R. 9 Q. B. 48 (1873). Compare Ballantine, *Title in Adverse Possession* (1919) 28 YALE L. J. 219, 224.

[18] Harden v. Watson, 104 Ark. 641, 148 S. W. 506 (1912); Bedell v. Shaw, 59 N. Y. 46 (1874).

[19] Hunnewell v. Burchett, 152 Mo. 611, 54 S. W. 487 (1899).

has served as color of title, and no case has been found where there was a claim by color of title under a void portion of an otherwise valid will. The question is therefore open to speculation.

Color of title occurs when possession is taken under a conveyance which is invalid for want of capacity in the grantor, or for defective execution,[20] which defect, however, must not be so obvious as to be recognized by a man of "ordinary capacity" [21] Furthermore, the claimant must connect himself in some way with the instrument.[22] If a will can meet these requirements it may operate as color of title.[23]

At first glance it might seem that where the claimant claims by color of title under a statutorily void portion of an otherwise valid will, the void portion could satisfy the requirements of color of title. For, although the testator has capacity to devise the property, it might be argued that the defect is one of execution—to be found in the witnessing of the instrument—or at least that it has the same effect as a defect of execution: it makes the devise to the witness void in the same way that any conveyance, such as a deed by a married woman without her privy examination (a statutory defect), is void and will convey no title. If it is a defect of execution, created by statute, it should be no more cognizable to a man of "ordinary capacity" than any other defect by which deeds are held to be void. As for a connection with the instrument, the claimant is clearly named therein as devisee. Conversely, it should be pointed out that the will itself, unlike most instruments operative as color of title, is not an invalid instrument, but rather is proved by testimony of the claimant himself. This argument may be attacked on the ground that the adverse possessor is claiming only under the void portion of the will. Furthermore, prior to the statute, the whole will was made invalid by attestation by a beneficiary.[24]

However, it is arguable as to whether or not the statutory defect is one of execution. It will be found that in most instruments good as color of title, the permissible defect is one in the grantor or in the mode he uses to dispose of his property. The grantor is either unable to set up the machinery for conveyance, or else the machinery which he does set up breaks down before its job of conveyance is complete, without the grantee contributing to the defect. This is the effect of a true defect of execution. But the statute under consideration, by declaring

[20] Neal v. Nelson, 117 N. C. 394, 23 S. E. 428 (1895); Williams v. Scott, 122 N. C. 545, 29 S. E. 877 (1898).
[21] McConnell v. McConnell, 64 N. C. 342, 344 (1870).
[22] Hines v. Symington, 137 Md. 441, 112 Atl. 814 (1921).
[23] McConnell v. McConnell, 64 N. C. 342 (1870).
[24] REV. STAT. (Iredell & Battle, 1836-7) c. 122, §1.

the devise in question to be void, has the effect of saying that the witness-devisee cannot take under it. It is a defect in the taker of the property and not in the devisor or in the means he uses to dispose of his property. Treating the deficiency as an incapacity of the devisee to take, rather than as a true defect of execution, the rule as to obviousness of defect has no application. Finally, if the effect of the statute is to say that a devisee cannot take as devisee, in contrast with those statutes which say that the grantor cannot convey, it would seem anomalous to allow the witness-devisee to use as color the instrument from which he is expressly barred.

If the witness-devisee should possess the land supposedly permissively—that is, under the terms of the will—such possession would have no effect, since according to the terms of the will, as modified by statute, the legal title is in another, or others, and he would therefore be claiming in subordination to such legal title and could be turned out at any time by those owning it.[25] This differs from claiming adversely the estate which was attempted to be devised by the will. The latter type of claim merely limits the extent of the adverse possessor's claim, while the former recognizes title to be in the true owner.

Aside from the question of the character of the claimant's possession as being consistent with the requirements of adverse possession, the problem of whether he can gain quiet title to the land resolves itself into a question of who has the right of entry and when this right accrues.[26] This is essentially a problem of future interests and beyond the scope of this note. Briefly sketched, however, the problems involved deal with construction of the will to determine whether a devise is a contingent or vested remainder or an executory devise.[27] The local view as to the effect on a contingent remainder of an avoidance of the particular estate supporting it, and the question of acceleration of remainders[28] is of vital importance in determining who has the right of entry and when it accrues. Wherever the defendant claims by adverse possession, the solution of this question is the most important angle of

[25] Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154 (1895); Hill v. Bean, 150 N. C. 436, 64 S. E. 212 (1909).

[26] Northern Pac. Ry. v. Smith, 62 Mont. 108, 203 Pac. 503 (1921); Ferenbaugh v. Ferenbaugh, 104 Ohio St. 556, 136 N. E. 213 (1922).

[27] N. C. CODE ANN. (Michie, 1939) §1737; Pendleton v. Pendleton, 6 N. C. 82 (1811); Southerland v. Cox, 14 N. C. 394 (1832); Shull v. Johnson, 55 N. C. 202 (1855); Hall v. Robinson, 56 N. C. 348 (1857); Buchanan v. Buchanan, 99 N. C. 308, 5 S. E. 430 (1888); Fields v. Whitfield, 101 N. C. 305, 7 S. E. 780 (1888); Watson v. Smith, 110 N. C. 6, 14 S. E. 640 (1892); Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687 (1907); American Yarn & Processing Co. v. Dewstoe, 192 N. C. 121, 133 S. E. 407 (1926).

[28] See SIMES, LAW OF FUTURE INTERESTS (1936) §§755-760.

the case, and should be disposed of first, for if the plaintiff has no right of entry or if the statute has not yet run against a plaintiff having the right of entry, then the case is disposed of—either against or for the plaintiff, without any necessity for a consideration of the facts of the adverse possession.

In the principal case there were five heirs to take as intestate property the void estate devised to Newton, two of whom were Gertie and Newton. Each of these five heirs would take, by intestate succession, a one-fifth undivided interest in the estate which was devised to Newton, which estate was a defeasible fee, subject to being defeated by Newton's death without issue. Upon the defeasance of Newton's estate, the estate limited to Gertie by way of executory devise would vest, and the owner thereof would then, but not until then, have a right of action against those in possession of the land. Further, those who had been in rightful possession of the property as heirs, or as successful adverse possessors against the heirs, would no longer have a right to the property, since the estate they had gotten as heirs or as adverse possessors against the heirs, would have come to an end—defeated by Newton's death without issue. They would therefore be claiming adversely to a new owner, whose right of action had just begun. Assuming that the plaintiff, as the heir of the executory devisee, showed title to the 50 acres in question, and that the statute of limitations could not possibly have run against her, since the action was instituted within six years of the vesting of the executory devise, the problem of adverse possession against her could not arise. But since the owner of the one-fifth undivided interest, which Gertie got as heir in intestacy upon the avoidance of the devise to Newton, and the holder of the executory devise are the same person, there may be added the problem of whether the two estates would merge at the outset so as to eliminate a second cause of action concerning this portion of the property;[29] and, assuming that they would merge and that Gertie or her heirs would have only one right of entry as to the one-fifth undivided interest—immediately upon the death of the testator—then whether Newton's possession was adverse or permissive as to this one-fifth undivided interest would be all-important. On this question as to this particular portion of the land, assuming the existence of merger, the issue of adverse possession should have been submitted to the jury; but aside from this part of the land in question, the indicated outcome of the case, disregarding

[29] Youmans v. Wagener, 30 S. C. 302, 9 S. E. 106 (1889); Little v. Bowen, 76 Va. 724 (1882); 2 BL. COMM. *177; see SIMES, LAW OF FUTURE INTERESTS (1936) §102.

for the purposes of this note the other issues[30] raised by the parties, would seem to be clearly in favor of the plaintiff.

SAMUEL R. LEAGER.

Workmen's Compensation—Employee's Right to Sue Third Party Tortfeasor.

P was severely injured in an accident caused by defendant railroad while he was assisting in switching a box car for the use of his employer. Although the employer reported the accident to the Industrial Commission in accordance with the provisions of the North Carolina Workmen's Compensation Act, *P* disregarded the Act and instituted a tort action against *D*. Subsequently, before *P*'s action came to trial, an award issued from the Commission, upon petition of the company's physician, for the medical services rendered to *P*. This award was paid by the insurance carrier. Thereafter, and during the six-month statutory period allowed it, the carrier instituted a suit against *D*, based on the right to subrogation. While this suit was pending the lower court dismissed *P*'s present action on the ground that the carrier had paid an award and had instituted suit against *D* as provided by the Act. On appeal, *held*, the injured employee could proceed with his suit at law since there had been no award of compensation.[1]

Where an employee is injured under circumstances creating in some other person than the employer a legal liability to pay damages, Section

[30] After Newton's death the defendant Williams failed to pay the taxes on the property and it was sold at a tax foreclosure sale to Williams' attorney, who conveyed it to the wife of Williams, for a consideration. It was contended by defendants that this showed good title to be in them. Brief for Defendant-Appellants, pp. 7-10, Barrett v. Williams, 215 N. C. 131, 1 S. E. (2d) 366 (1939).

[1] Thompson v. Virginia & C. S. R. R., 216 N. C. 554, 6 S. E. (2d) 38 (1939). As to whether payment of medical expenses under an award was compensation was a corollary question decided by this case. The Act does not define an award. A definition seems unnecessary since other sections of the Act define the obligations of the employer. Therefore, in the instant case, the award (for medical expenses) did not constitute compensation as defined by the Act: N. C. CODE ANN. (Michie, 1939) §8081(i)(k) (compensation "means the money allowance payable to an employee or to his dependents as provided for in this act, and includes funeral benefits provided herein"). That medical expenses are not compensation has been further settled by the recent North Carolina case of Morris v. Laughlin Chevrolet Co., 217 N. C. 428, — S. E. — (1940).

The definitions of compensation in other states are diverse, for example: CONN. GEN. STAT. (1930) §5231 ("The word 'compensation' . . . shall be construed to include not only incapacity payments to an injured employee and payments to dependents of a deceased employee, but also sums paid out for surgical, medical and hospital services to an injured employee and the . . . burial fee provided by law."); DEL. REV. CODE (1935) c. 175, §46(a) ("The term 'compensation' . . . shall be held to include surgical, medical and hospital services, medicines and supplies, and funeral benefits, provided for in this chapter."). In Employers Liability Assur. Corp. v. Fisher, — Misc. —, 13 N. Y. Supp. (2d) 902 (Rochester City Ct. 1939), subrogatee was successful in suit against third party for medical expenses although compensation award had never been made.

11 of the North Carolina Workmen's Compensation Act provides that the employee may claim compensation, and after an award, the employer may commence an action in his own name and/or in the name of the injured employee, and the excess over payment of court costs, attorney's fees and reimbursement shall be paid the injured employee. If, however, the employer does not commence such action within six months from the date of such injury, the employee may thereafter bring the action in his own name, and any recovery shall be paid in the same manner as if the employer had brought the action.[2]

The original form of Section 11 was similar to the type of election statute generally prevalent, providing that acceptance of an award of compensation constituted a surrender by the employee of his common law right against third parties. If the employer, having paid compensation, exercised his right to subrogation and recovered an amount in excess of disbursements, the employee received it.[3] The provision was amended, apparently, to remedy the situation where the employer failed to proceed against the third party tortfeasor.

Under Section 11 the employer has no right to sue the third party tortfeasor until an award of compensation has been made. Complications arise where compensation has not been awarded. First, has the employee a right to sue the tortfeasor without attempting to secure an award under the Act? Next, if this question be answered in the affirmative, may such suit be brought within six months after the injury? Our court, in permitting such a suit in the principal case, stated that the "provision making the remedy against the employer exclusive, does not appear in the clause relating to suits against third parties."[4] Thus, the employee is permitted to resort to other remedies than the statutory procedure to recover for his injury. The decision does not mention a recent North Carolina case[5] which might have been authority for holding that under no circumstances could the employee sue before seeking compensation, and that during the first six months after injury, the right to proceed against the third party was under the exclusive control of the employer. Furthermore, the pertinent proviso of the section lends itself to an interpretation that the right is exclusively the employer's, since the section seems to abrogate the employee's cause on

[2] N. C. CODE ANN. (Michie, 1939) §8081(r) (referred to in text as Section 11).
[3] N. C. Pub. Laws 1929, c. 120, §11, Phifer v. Berry, 202 N. C. 388, 163 S. E. 119 (1932).
[4] Thompson v. Virginia & C. S. R. R., 216 N. C. 554, 556, 6 S. E. (2d) 38, 39 (1939).
[5] Ikerd v. North Carolina R. R., 209 N. C. 270, 183 S. E. 402 (1936) (held that employee could maintain action in his own name upon employer's failure to institute suit during the six months after the injury).

one hand, and, on the other, revives it if the employer fails to sue within six months after injury.

In the instant case, the employee by suing the tortfeasor at common law prior to seeking compensation failed to follow the statutory procedure. The court, in permitting such, made this observation: "The defendant is not primarily concerned with the form in which this action against it . . . is prosecuted, except to see that it may not be twice vexed nor more than one recovery allowed." That the third party tortfeasor is vitally interested in the form of the action against him, for other purposes than the avoidance of double liability, can be seen when the contributory negligence of the employer is considered. Even though the employer is guilty of negligence contributing to the employee's injury, our court denies the third party tortfeasor the right to join the employer as defendant (as joint tortfeasor).[6] Any verdict secured against the third party will be diminished to the extent of the amount of compensation theretofore paid by the contributorily negligent employer.[7] Thus, if the employee has been awarded $5000 by the Commission and subsequently secures a jury verdict for $6000 against the third party tortfeasor, this third party need pay only $1000—this sum with the $5000 already paid by the (contributorily negligent) employer fully compensates the employee. However, if the award is $5000 and the verdict is $15,000, the third party must pay $10,000 as compared with the $5000 payment of the equally culpable employer. The inequities, ameliorated outside the Workmen's Compensation Act by a statutory provision for equal contribution from joint tortfeasors,[8] are manifest. If the employee sues the third party tortfeasor prior to seeking compensation and the employer is contributorily negligent, the third party, being unable to join the employer as a defendant, must bear the full brunt of liability.

If the principal case is followed in the future, an employee may lose his rights against the employer, if he elects to sue the third party tortfeasor and the twelve-month period elapses.[9] If he fails in his suit at law, he will get nothing. This revives the effect of the old election provision, which several states still retain,[10] with its attendant harshness.

[6] Brown v. Southern Ry., 202 N. C. 256, 162 S. E. 613 (1932).
[7] Brown v. Southern Ry., 204 N. C. 668, 169 S. E. 419 (1933), (1933) 12 N. C. L. REV. 73.
[8] N. C. CODE ANN. (Michie, 1939) §618.
[9] Note (1936) 15 N. C. L. REV. 85 (discusses filing of claims and statute of limitations).
[10] Examples: FLA. COMP. GEN. LAWS ANN. (Supp. 1938) §5966(38); IDAHO CODE ANN. (1932) §43-1004; N. D. COMP. LAWS (Supp. 1913-1925) §396a20; TEX. REV. CIV. STAT. (Vernon, 1925) art. 8307, §6a; VT. PUB. LAWS (1933) §6511; 15 & 16 Geo. V. c. 84, §30 (1925), Lind v. Johnson, 54 T. L. R. 95 (1937).

These hardships arise from the failure of the legislature (or from the failure of the courts in construing the legislative intent) to provide for the situation where compensation has not been sought. Apparently, the legislature assumed that the employee would take advantage of the Act—needless to say, this assumption is erroneous and leaves a gap in the statute law. In addition to providing for the situation where compensation has not been sought, there should be a provision in Section 11 that the negligent employer and third party should participate equally in the payment of any judgment secured by the employee.

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